Supreme Court, U.S.
FILED

No. _____ (1)

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In The

Supreme Court of The United States

October Term, 1997

ROBERT L. SCHULZ and JOHN SALVADOR, JR.

Petitioners,

THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR; and MICHAEL FINNEGAN, CHIEF COUNSEL TO THE GOVERNOR, and GARY SHEFFER, SPOKESMAN FOR THE GOVERNOR; THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY and JOSEPH BRUNO, MAJORITY LEADER OF THE SENATE; THE NEW YORK STATE UNIFIED COURT SYSTEM, JUDITH KAYE, CHIEF JUDGE; THE NEW YORK STATE BOARD OF ELECTIONS, CAROL BERMAN, CHAIRMAN, THOMAS WILKEY, EXECUTIVE DIRECTOR; and THE NEW YORK STATE BOARD OF CANVASSERS, CAROL BERMAN, CHAIRMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Can the State of New York, being one of the United States of America, be made a party-defendant in the federal court, at the suit of a private citizen who is a citizen of the State of New York, if the case arises under the U.S. Constitution?

2. Are "loss of liberty," and "erosion of sovereignty," brought about by the state's alleged violation of the "petition clause" of the 1st Amendment, the "privileges and immunities clause" of the 14th Amendment and the "guarantee clause" of Article IV of the U.S. Constitution, injuries sufficiently concrete to give the federal court jurisdiction to determine plaintiffs' claims?

3. Do plaintiffs have standing to raise the following question in federal court: Is a state's judicially determined purpose of "minimizing uncertainty in the minds of potential investors," sufficiently compelling to justify the enforcement of a state law which abridges the fundamental right of private citizens of that state to timely petition the state court for a redress of grievances that are deeply rooted in the State Constitution, if the grievance involves a legislative act which authorizes public borrowing?

4. Do plaintiffs have standing to raise the following question in federal court: Whether plaintiffs' fundamental rights to petition the government for a redress of constitutional grievances (First Amendment), to a guarantee against State laws which abridge fundamental privileges and immunities (Section 1, Clause 2 of the Fourteenth Amendment), and to a government republican in form ***and substance*** (Article IV, Section 4) are being violated by New York State Finance Law Section 123-b(1) which, in the case of matters involving the incurrence of public debt, is preventing plaintiffs from petitioning State courts for a redress of State ***constitutional*** grievances.

5. Do plaintiffs have standing to raise the following question in federal court: Whether plaintiffs' fundamental right, as

expressed in Article III, Section 16 of the New York Constitution (State Legislature prohibited from enacting a law which provides that another law is a part of it or applicable to it without ***"inserting"*** the other law in it, at least by reference) and, thus, plaintiffs' rights under the 14th Amendment's "privileges and immunities clause" and under Article IV's "guarantee clause" have been violated by the enactment of Chapters 412 and Chapter 413 of the New York Laws of 1996.

6. Do plaintiffs have standing to raise the following question in federal court: Whether plaintiffs' fundamental right, as expressed in Article VII, Section 11 of the New York Constitution (State Legislature prohibited from enacting a law to create a state debt subject to voter approval, unless the purpose of the debt is ***"distinctly specified therein"***) and, thus, plaintiffs' rights under the 14th Amendment's "privileges and immunities clause" and under Article IV's "guarantee clause" have been violated by Chapter 412 when read together with Chapter 413 of the New York Laws of 1996.

7. Do plaintiffs have standing to raise the following question in federal court: Whether plaintiffs' fundamental right under the First Amendment to the United States Constitution and under Article I, Section 9 of the New York Constitution (guaranteeing free elections, i.e., elections free from governmental interference and corruption) and, thus, plaintiffs' rights under the 14th Amendment's "privileges and immunities clause" and under Article IV's "guarantee clause" have been violated by the State's promotional activities to secure passage by the voters of the Bond Act.

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT L. SCHULZ and JOHN SALVADOR, JR.

Petitioners,

THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR; and MICHAEL FINNEGAN, CHIEF COUNSEL TO THE GOVERNOR, and GARY SHEFFER, SPOKESMAN FOR THE GOVERNOR; THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY and JOSEPH BRUNO, MAJORITY LEADER OF THE SENATE; THE NEW YORK STATE UNIFIED COURT SYSTEM, JUDITH KAYE, CHIEF JUDGE; THE NEW YORK STATE BOARD OF ELECTIONS, CAROL BERMAN, CHAIRMAN, THOMAS WILKEY, EXECUTIVE DIRECTOR; and THE NEW YORK STATE BOARD OF CANVASSERS, CAROL BERMAN, CHAIRMAN,

Respondents.

OPINIONS BELOW[1]

The Order of the United States Court of Appeals for the Second Circuit (Appendix A, at A-1) is unreported, entered April 6, 1998.

The Decision and Order of the United States District Court for the Northern District of New York (Appendix B, at pages A-6 to A-32), is reported at 960 F.Supp. 568, decided April 12, 1997.

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[1] The opinions of the New York State Court of Appeals and of the New York State Appellate Division Third Department, in a related case, are included at Appendix C and D.

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit was entered on April 6, 1998.

In accordance with Rule 13.4 of this Court, this petition is filed within 90 days of the date of the Order of the Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

1. The preamble to the Constitution of the United States provides: ***"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common Defence, promote the general Welfare and secure the Blessing of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."***

2. Article III, Section 2 of the Constitution of the United States provides: ***"The judicial power shall extend to all cases in Law and Equity, arising under this Constitution...."***

3. Article VI of the Constitution of the United States provides in relevant part: ***"The Judges in every state shall be bound by this Constitution."***

4. The First Amendment to the United States Constitution reads, in relevant part: ***"Congress shall make no law...abridging...the right of the people...to petition the Government for a redress of grievances."***

5. The Fourteenth Amendment (Clause 2) to the United States Constitution provides, in relevant part: ***"No state shall make***

or enforce any law which shall abridge the privileges or immunities of citizens of the United States...."

6. An implicit constitutional (structural) safeguard is *"separated powers"* among the legislative, executive and judicial branches.

7. Article IV, Section 4 of the United States Constitution reads in relevant part: *"The United States shall guarantee to every citizen in this Union a republican form of government."*

NEW YORK CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

8. New York State Finance Law Section 123-b(1) reads: *"notwithstanding any inconsistent provision of law, any person, who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property, except that the provisions of this subdivision shall not apply to the authorization, sale, execution, or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation."* (Petitioners' emphasis)

9. Article I, Section 9.1 of the New York Constitution provides in relevant part: *"No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government or any department thereof...."*

10. Article III, Section 16 of the New York Constitution reads: *"No act shall be passed which shall provide that any*

existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act."

11. Article VII, Section 11 of the New York Constitution reads: *"No debt shall be hereinafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, **to be distinctly specified therein**."* (Petitioners' emphasis).

12. Chapter 412 of the New York Laws of 1996 entitled, "The Clean Water/Clean Air Bond Act."

13. Chapter 413 of the New York Laws of 1996 (untitled).

STATEMENT OF THE CASE

A. INTRODUCTORY STATEMENT

The court is asked to reverse on standing and remand.

By this case plaintiffs had hoped to have the federal court reaffirm the following facts: that the people are the sovereign unit in our society; that by their State Constitution the people structure and regulate the state government; that if those in state government ignore the will of the people as expressed in the State Constitution by, for instance, making and enforcing laws that are repugnant to constitutional prohibitions, then the people can petition the United States Court for redress of their grievances under Article IV, Section 4 of the US Constitution and under Section 1, Clause 2 of the Fourteenth Amendment thereto, especially if there is a pattern of such abuse.

This is not a taxpayer action, i.e., a petition for judicial review of the power of the Legislature and Executive branches to tax and spend. Rather this is a petition by citizens for federal judicial review, under, inter-alia, the federal guarantee clause, of the power of the NY's governmental leaders: a) to make and enforce

a "door closing" law that disallows persons a forum in which to assert their constitutional rights, if the matter involves the incurrence of public debt; and b) to trade on the credit of the Governor's office to raise money to pay for a blanket of media propaganda with which to cover the voters in order to sway the results of a vote on a ballot question.

Plaintiffs have detailed the constitutional provisions that have been violated and their injuries that fall within the zones of interest to be protected by those constitutional provisions. See Tables 2 - 4 which follow this section of the Petition.

Distilled, plaintiffs' claims challenge the (federal) constitutionality of three actions taken by the Legislative and Executive branches of the State of New York. The three State governmental actions under constitutional attack are:

1. The adoption of New York State Finance Law Section 123-b(1), which denies citizens the right to petition the government for a redress of State constitutional grievances. (The "constitutional standing" issue).
2. The adoption of Chapters 412 and 413 of the NY Laws of 1996 in spite of NY constitutional restrictions and prohibitions under Article III and Article VII. (The $1.75 billion "Bond Act" issue).
3. The behavior of certain State officials in trading on the credit of their offices to raise millions of dollars from firms which do business with the state to cover the electorate with a blanket of state-sponsored media propaganda in order to sway the results of the statewide vote on a ballot question (the "right to a free election" issue).

Plaintiffs have alleged that each of the three actions should be declared unconstitutional, because each is violative of Section 1, Clause 2 of the Fourteenth Amendment of the US Constitution -- the so-called "privileges and immunities ("P&I") clause." But, the District Court dismissed all claims after applying the wrong privileges and immunities clause! The Court applied the P&I clause from Article IV, Section 2, Clause 1, rather than the P&I

clause actually raised and presented by plaintiffs -- the P&I clause from Section 1, Clause 2 of the Fourteenth Amendment. ***The Second Circuit affirmed the lower court's dismissal but for lack of standing/jurisdiction -- something the lower court refused to do.***

Plaintiffs have also alleged that each of the three actions should be declared unconstitutional because each is violative of Article IV, Section 4 -- the so-called "guarantee clause" -- under which plaintiffs are guaranteed "a republican form of government" in any state in which they choose to reside, including New York State. In agreeing to join the union in 1787, New Yorkers were guaranteed under Article IV, Section 4, that the United States government would guarantee that the citizens of New York would always enjoy a government republican in form ***and substance***, which includes: popular sovereignty; self-government; a government that derives its powers from the consent of the governed; and a government that must be subservient to the will of the people as expressed in their State Constitution. The District Court dismissed all guarantee clause claims because (the Court held) neither the plaintiffs nor the Court could cite any case where the guarantee clause has been invoked to invalidate the actions of the State itself ***on a nonpolitical question***. It was neither fair nor equitable for the Court to dismiss plaintiffs' guarantee clause claims solely because those claims are novel, presenting a first impression case. The primary role of the Court is to interpret and apply the Constitution to the other two branches and to the states, no matter the level of practical difficulty. If, as is the case here, case law does not provide any guidance then the District Court is expected to interpret the constitutional provision and apply its construction to the facts of the case. The Second Circuit did not reach the questions relating to the guarantee clause. Instead, ***the Second Circuit dismissed the case for lack of standing/jurisdiction -- something the lower court refused to do.***

Plaintiffs have also alleged that New York State Finance Law Section 123-b(1) is violative of the First Amendment because on its face, and in its application, it strips plaintiffs of their right to

petition the government for a redress of constitutional grievances if the matter involves the incurrence of public debt. The District Court dismissed plaintiffs' complaint without considering plaintiffs' First amendment, "right to petition" claim. ***The Second Circuit dismissed the case for lack of standing/jurisdiction -- something the lower court refused to do.***

Finally, plaintiffs have also alleged that the behavior of the New York State Governor violated plaintiffs' First Amendment right to a free election when he traded on the credit of his office to raise millions of dollars from outside sources, including corporations that have business before the State, in order to cover the electorate with a blanket of media propaganda to sway the results of a vote on a statewide ballot question by enticing "yes" votes. The District Court dismissed the claim saying that to prohibit such behavior would be to deny the Governor his right of free speech. Plaintiffs appealed from that decision, arguing that the issue was not a free speech issue but an issue involving plaintiffs' First Amendment right to an election free from governmental interference and corruption. ***The Second Circuit dismissed for lack of standing/jurisdiction -- something the lower court refused to do.***

B. STATEMENT OF FACTS

In 1975, the New York State Legislature and the Executive adopted a law [State Finance Law Section 123-b(1)] which, in its plain language and effect, denies citizens their right to petition their government for a redress of grievances deeply rooted in the New York Constitution -- to assert their constitutional rights in any forum -- by specifying that citizens shall not be allowed to maintain a lawsuit if the subject matter deals with public debt -- i.e., the "authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the State or any agency, instrumentality or subdivision thereof, or by any public corporation or public benefit corporation."

In 1979, in violation of the "Separate Powers" doctrine, the New York Court of Appeals issued its decision in Wein v. Comptroller, 46 NY2d 394, ruling that SFL 123-b(1) "does indicate a reasonably clear ***legislative*** intent to prevent taxpayer challenges with respect to a State bond issue or notes issued in anticipation thereof [SFL 123-b(1)]. Under the circumstances it would be inappropriate for the courts to confer standing in these cases since such a determination would, in effect, render the statutory 'exception' a nullity and ignore the expressed ***legislative*** policy to the contrary," and that to allow citizens to challenge legislative acts that authorize the incurrence of public debt would "increase the cost of raising revenue ***by creating uncertainty in the minds of potential investors.***" (Plaintiffs' emphasis). *Note: The constitutionality of SFL 123-b(1) under the First Amendment was neither raised, presented nor determined in Wein.*

The New York Judicial branch has been honoring SFL 123-b(1) by dismissing claims that involve public borrowing. By doing so it has been cooperating with the Executive and Legislative branches, allowing the N.Y. Constitution, in effect, to be changed by the Legislature: first, by SFL 123-b(1), and then by various legislative acts which authorize public borrowing and which are obnoxious to the N.Y. Constitution but which are shielded from citizen suits and judicial review by the impenetrable, door-closing barrier represented by SFL 123-b(1).

The latest example of this is the June 9, 1998 decision by the N.Y. Court of Appeals in a related case. The decisions in that case by the N.Y. Court of Appeals and the N.Y. Appellate Division of State Supreme Court are included as Appendix C and D hereto. There, the N.Y. Court of Appeals dismissed, for lack of standing by virtue of SFL 123-b(1), plaintiffs' Article III, Section 16 challenge to Chapters 412 and 413 of the N.Y. Laws of 1996. The court ruled, in effect, that it is more important for the state to "minimize uncertainty in the minds of potential investors" than to allow citizens to exercise their fundamental right to petition the government for a redress of grievances caused by legislative acts authorizing public borrowing (Chapter 412 and 413), even if those legislative acts are repugnant to the N.Y.

Constitution. One would not know from a reading of the decision by the Court of Appeals that plaintiffs had fully argued at all three levels of the N.Y. court system that SFL 123-b(1) was unconstitutional as violative of the petition clause of the First Amendment. Having dismissed plaintiffs' Article III, Section 16 claim against Chapters 412 and 413 for lack of standing under SFL 123-b(1), the state court was then able to dismiss plaintiffs' Article VII, Section 11 claim against Chapters 412 and 413 as "irrelevant".

On or about July 14, 1996, the New York State Legislature passed Chapter 412 of the laws of 1996 ("Chapter 412 L96"), an Act authorizing the creation of a state debt to the amount of one billion seven hundred and fifty million dollars ($1,750,000,000) and providing for the submission to the people of a proposition or question therefor to be voted on at the general election in November 1996. The two-page Act was entitled, "The Clean Water/Clean Air Bond Act of 1996.

On or about July 14, 1996, the New York State Legislature also passed Chapter 413 of the Laws of 1996 ("Chapter 413 L96"), an Act "in relation to the implementation of the Clean Water/Clean Air Bond Act of 1996." Chapter 413 L96, which is 50 pages, was not given a title. It contained the definitions, purposes and specificity missing from Chapter 412 but required to be there by Article VII, Section 11 of the N.Y. Constitution.

On or about August 1, 1996, Governor Pataki signed Chapter 412 and Chapter 413 L96. Chapter 412 was to become law immediately upon approval by the voters at the general election on November 5, 1996. Chapter 413 L96 was to become law ***if the voters approved Chapter 412***.

The public was told about the signing of Chapter 412. The public was not told about Chapter 413.

On or about August 2, 1996, the New York State Board of Elections, as required by law, sent the local Boards of Election a certification of the text of ***Chapter 412***, the abstract of ***Chapter***

412 and the form of submission of Proposal Number One, A Proposition relating only to ***Chapter 412***. ***Nowhere in the certification to the local boards of election did the Board of Elections make any reference to Chapter 413.***

The following is the question that went before the voters on November 5, 1996: "Shall ***Chapter 412*** of the Laws of 1996 known as the Clean Water/Clean Air Bond Act of 1996, authorizing the creation of State debt to provide moneys for the preservation, enhancement, restoration and improvement of the State's environment and natural resources in the amount of one billion seven hundred fifty million dollars ($1,750,000,000) be approved?" (Plaintiffs' emphasis).

Chapter 412 is two pages in length. It makes absolutely no reference to ***Chapter 413*** which is 50 pages in length. ***Chapter 412*** became effective immediately upon approval by the voters at the general election on November 5, 1996. ***Chapter 413*** became effective upon the approval by the voters of ***Chapter 412***. However, the public was never told about ***Chapter 413!*** The public was not told that they were voting to approve Chapter 413 as well as Chapter 412.

On September 11, 1996, to help assure that the voters would approve the Bond Act proposition on the November ballot, Governor Pataki placed two of his most senior political operatives (Chief Counsel Michael Finnegan and Chief Spokesman, Gary Sheffer) on a temporary leave of absence for the expressed purpose of creating a political action committee (PAC), to raise more than $1 million from Wall Street firms and others that would benefit financially if the Bond Act passed the voters, and to use that money to pay for TV ads which would blanket the electorate for two weeks prior to the election. ***These TV spots featured the Governor explicitly exhorting the electorate to "vote yes" on the Bond Act (Chapter 412).***

The Governor used the PAC, in effect, as an arm of the government: to trade on the credit of his office; and to raise money, particularly from businesses that have business before the

state, in order to pay for TV ads in which the Governor explicitly exhorted the voters to "vote yes" on the ballot question. Those businesses include, but by no means are limited to, those listed on Table 1. Of the $1.726m raised by the PAC, $1.275m was spent on the governor's TV ads. This obviously interfered with plaintiffs' First Amendment right to an election free from governmental interference and corruption.

An informed electorate is crucial to our democratic-republic. However, other than the Governor's TV "vote yes" exhortations, and the certification sent to the County Boards of Election regarding ***Chapter 412***, the government failed in its duty to inform the voters about the purposes of the debt; ***Chapter 413, the details on the use of the Bond Act proceeds, was never mentioned.***.

The vote on the Bond Act (Chapter 412) passed with about 2.1 million "yes" votes and 1.7 million "no" votes.

In October, 1996, petitioners filed two lawsuits containing identical causes of actions and presenting identical federal questions. One suit was filed in the U.S. District Court on October 13, 1996. The other was filed in the N.Y. State Supreme Court for Albany County on October 16, 1996.

The federal case was decided by the Second Circuit on April 6, 1998. The instant petition relates to the federal case but in its text it also refers to the state case and its appendices include the decisions by the N.Y. appeals courts. The state case was decided by the N.Y. Court of Appeals on June 9, 1998. ***A Petition for a Writ of Certiorari to the N.Y. Court of Appeals will be filed with the court in the near future.*** In its text it will also refer to the federal case (the subject of this petition).

The identical claims filed in the two lawsuits can be summarized as follows:

1. New York State Finance Law Section 123-b(1) is unconstitutional. It violates the First Amendment and Article I, Section 9.1 of the N.Y. Constitution and, thus, the federal

"privileges and immunities" clause of the 14th Amendment and the "guarantee" clause of Article IV, Section 4 of the U.S. Constitution.

2. Chapter 412 and Chapter 413 of the N.Y. Laws of 1996 are violative of Article III, Section 16 and Article VII, Section 11 of the N.Y. Constitution and, thus, the federal "privileges and immunities" clause of the 14th Amendment and the "guarantee" clause of Article IV, Section 4 of the U.S. Constitution.
3. The actions of certain state officials to entice "yes" votes to sway the results of a statewide vote on Chapter 412 were violative of the 1st Amendment and Article I, Section 9.1 and Article VII, Section 8 of the N.Y. Constitution and, thus, the federal "privileges and immunities" clause of the 14th Amendment and the "guarantee" clause of Article IV, Section 4 of the U.S. Constitution.

C. BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

This action was brought pursuant to 28 USC Section 1331 and 1343(3) and 28 USC Section 1983.

TABLE 1

CONTRIBUTIONS TO THE CLEAN WATER/CLEAN AIR BOND ACT COMMITTEE BY CORPORATIONS WITH BUSINESS BEFORE THE STATE: A SAMPLE

Bankers That Help The State Issue Bonds

Goldman Sachs	$25,000
First Albany	25,000
Morgan Stanley	25,000
J.P. Morgan	25,000
Paine Webber	25,000
Merrill Lynch	25,000
Dillon Read	25,000
Chase Manhattan	25,000
Lehman Brothers	25,000
Bear Stearns	25,000
Smith Barney	25,000

Law Firms That Help The State Issue Bonds

Hawkins, Delafield & Wood	$10,500
Dewey Ballantine	10,000
Skadden, Arps, Slate, et al.	5,000
Brown & Wood	2,500

Insurer of State Bond Issues

MBIA	$25,000

Table 2

SUMMARY OF
PLAINTIFFS' RIGHTS AND INJURIES
("Constitutional Standing" issue)

Summary of Issue	Plaintiffs' Injuries	Federal Constitutional Rights Violated	State Constitutional Rights Violated
Whether Sec.123-b(1) of NY State Finance Law violates plaintiffs' constitutional rights, including right to petition the government for a redress of grievances and right to a republican form of government.	Loss of sovereignty. Erosion of liberty. Substantial public debt Substantial tax revenue requirement. Adds to existing burden-some debt and personal tax load.	1st Amendment: Right to petition government for a redress of grievances. Article IV, Section 4: Right to constitutional government, republican in form: based upon the consent of the people. 14th Amendment: Right of freedom from having constitutional privileges and immunities abridged by the state.	Article I, Section 9.1: Right to petition government for a redress of grievances. Article I, Section 6: Right not to have money property taken without constitutional due process.

Table 3

SUMMARY OF
PLAINTIFFS' RIGHTS AND INJURIES
("Clean Water/Clean Air Bond Act Issue")

Summary of Issue	Plaintiffs' Injuries	Federal Constitutional Rights Violated	State Constitutional Rights Violated
Whether by turning a blind eye to three provisions of The NY Constitution, in adopting the Bond Act, the state defendants violated plaintiffs' federal constitutional rights, including the right to a government republican in form and substance.	Loss of sovereignty. Erosion of liberty. Substantial public-debt incurred. Substantial tax revenue requirement. Adds to existing burdensome debt and personal tax load	Article IV, Section 4: Right to constitutional government, republican in form: based upon the consent of the people. 14th Amendment: Right of freedom from having constitutional privileges and immunities abridged by the state. 5th Amendment: Right not to have money property taken without constitutional due process.	Article III, Section 16: Right to have Chapter 413 L96 referenced if not "inserted" in Chapter 412 L96. Article VII, Section 11: Right to have purpose of the Bond Act debt "distinctly specified therein," i.e., in Chapter 412 L96, not Chapter 413 L96. Article VII, Section 11: Right to have Bond Act debt be for "single work or purpose".

Table 4

SUMMARY OF
PLAINTIFFS' RIGHTS AND INJURIES
(the "free election" Issue)

Summary of Issue	Plaintiffs' Injuries	Federal Constitutional Rights Violated
Whether plaintiffs constitutional rights were violated by the actions of State officials as they traded on the credit of the Governor's office to raise millions of dollars from corporations that have business before the state or who would have business before the state if the Bond Act was approved by the voters, to cover the voters with a blanket of media propaganda featuring the Governor explicitly exhorting the electorate to "vote yes".	1. Loss of sovereignty. 2. Erosion of liberty. 3. Vote was tainted due to government propaganda. 4. Less effective vote.	1. 1st and 9th Amendment: Right to freely and effectively petition the government through ballot box voting, without government sponsored propaganda. 2. Article IV, Section 4: Right to constitutional government, republican in form: based upon the consent of the people. 3. 14th Amendment: Right of freedom from having constitutional privileges and immunities abridged by the state.

REASONS FOR GRANTING THE WRIT

A. THIS IS AN ACTION IN THE ARENA OF THE NATURAL ORDER OF THINGS AND FUNDAMENTAL RIGHTS, AS VOICED IN THE U.S. CONSTITUTION AND IN THE NEW YORK CONSTITUTION

This petition has been prepared by *pro-se* plaintiffs in a lawsuit that requires clarification of constitutional requirements, both national and state. Although it has been the subject of much study and deliberation, plaintiffs fear it may not be as concise and connected as it deserves to be. However, it deals with constitutional provisions that are not often touched upon in arguments in the federal court, and which we believe are most necessary of exploration by the federal courts, if what we claim to be serious constitutional improprieties in the conduct of the government of the State of New York are to be defined as such, and cured.

Reports are beginning to appear in the national press that the governments of other states are becoming "innovative and monarchical" in their attempts to circumvent the debt-limiting restrictions of their State Constitutions. The question of "standing" to maintain an action in federal court against "willfully wayward" states should be addressed by this tribunal, in order to establish the appropriate criteria for the determination of standing in cases that are not "property or money" oriented.

We have made no references to cases, although we have visited many. Simply put, we know of none that are not distinguishable from this case. And we do know that the conclusions of leading thinkers and analysts on government and the "rights of man" -- present and long past -- harmonize with the principles which underlie and defend our argument on the questions now before the Court in this petition for a writ of *certiorari* related to the lawsuit which is the cause of this petition.

Since the very beginning, the acts of the early national congresses

and the acts of the early conventions, including the congress and committees of New York, are replete with similar expressions with respect to "republicanism" and to the "sovereignty of the people," and the servant nature of governments at all levels, and it is to the honor of the United States that in no other country are subjects of this kind better – or even so well – understood. One fact stands out: the attention and attachment of the Constitution of the United States and of the New York Constitution to the rights of the sovereign people are discernible, as hard copy, in almost every provision of these documents. It is to be deeply regretted that the constitutional principles which are the cause of action in the lawsuit in question have not yet received their merited acquiescence and approval as basic principles of governance – at least, not from New York State's Legislative, Executive and Judicial branches.

The United States and New York State have, in their constitutional language, advocated both the form and substance of constitutional republicanism, with its emphasis on individual rights and governmental responsibility for protecting and enhancing them. Operationally, however, these principles are honored more in the breach than in the observance. There still may be reason to hope that the government of the State of New York, in all three of its branches, may yet perceive the wrongness of actions it has taken, such as interdicting the right of the people to petition their government for a redress of grievances, and interfering with the people's right to a free election unmarred by the intrusion of governmental powers – or attempting to exempt the government that represents the body of her citizens from that "suability" which alone enables her citizens to assert their individual, fundamental rights and to seek and obtain the protections of their Federal and State constitutions. It is with this hope in mind that we petition this Court.

The extension of the judicial power of the United States to the controversy of this lawsuit appears to be wise, because, in the thoughts and words of the earliest members of this court, it would be "both honest and useful."

It would be honest because the Court, in its political unassailability, provides for the doing of justice without respect to persons, and for making individual citizens, as well as the States, secure in their respective rights. It would fulfill the promise which a free government makes to every free citizen -- the promise of equal justice and the protection of the laws; due deference to the sovereignty of the body of the people; and, due allegiance to the design imperatives -- the need to maintain a separation between and among the powers of governance: legislative, executive and judicial, and the need to acknowledge that government derives its just powers from the consent of the governed.

It would be useful for several reasons: because it would leave not even the least of its citizens without the means of obtaining justice from the State; because it would obviate the need for occasions of contests and violent quarrels between the citizens and their State due to the arising of claims that the design imperative principle of "a State government republican in form and substance" (with all that that statement includes and implies) is being or has been abandoned; because it would rest on the great moral truth that justice is the same whether due from one man to a million or from one million to one man; because it would teach and greatly enhance the value of our free republican form of government which places all persons on an equal footing and enables all to obtain justice without regard to the power or number of their opponents; because, based on the great principle that the great body of the people is the true sovereign of their States and of the nation; and, because, consequently, individual citizens are not to be degraded or penalized for appearing with each other in their own courts to have their controversies resolved.

The people have good reason to be thankful for their valuable liberties and privileges and ought never to forget that nothing but forthright insistence upon the perpetuation of constitutional law and government can insure the continuance and enhancement of their liberties and privileges.

What we intend to argue is, essentially, that citizens, in our

constitutional system, have an inalienable right to have a State government that is republican in form ***and substance***, through the structures and processes of which *governance* is provided, but only with the consent of the governed, and that, in New York State, these principles -- the "design imperatives" -- are being violated when

(1) the branches of government -- Legislative, Executive and Judicial -- which are designed to serve the people and to be independent elements in a system of checks and balances, combine to work together in obvious harmony to achieve private or political ends that neither (a) exhibit compliance with the constitutional requirement for their own independence in thought and action, nor (b) result in demonstrable achievement of the public benefit and good, and when

(2) citizen grievances (which would seem to indicate a measure of non-consent) are, on the basis of statute law, denied access to the judicial decision-making process in key public-debt issues, in obvious violation of the fact that any citizen has the constitutional right to petition the government for a redress of grievances, especially those that are rooted in the State Constitution.

Assuming that the foregoing are "givens," we are petitioning the Supreme Court of the United States of America, to require the federal court to accept jurisdiction in this matter, which finds itself at the root of the constitutional design-imperatives being violated, above, and to admit this petition for a writ of *certiorari* based upon the principle set forth in one of the earliest *dicta* of the U.S. Supreme Court that, when an aggrieved citizen of a State, finding himself with no other recourse, enters into a lawsuit against his State of residence and citizenship, in order to achieve the redress of grievances that are based upon constitutional rights and the need for interpretation thereof, the appropriate court of jurisdiction is the Supreme Court of the United States. See Chrisholm Ex'r v. Georgia, 2 Dall. 415, 1 L.Ed. 440.

Additionally, as petitioners we are seeking, for ourselves and for the citizenry of New York State, in general, a measure of simple

justice, based on the cardinal principle that "justice is justice" – whether it is meted out to one man or to a million, to one person or to a "body" of persons. On the other hand, it should be noted that the existence of ***injustice*** does not have to be recognized by all members of a body afflicted by it, in order for it to "be" injustice – indeed, it is an historical fact that the fathers of this country and the designers of the great doctrines and principles that have shaped its development, were led by one or two perceptive individuals who recognized the degree to which the injustices of despotism were being visited upon the people, and wrote major documents that exposed them as violations of the natural laws -- the "rights of man" -- that underlie and shape the basic doctrines -- the constitutions and statutes that frame and preserve our system and our society, today.

The pursuit of justice, in fulfillment of the constitutional design-imperatives expressed above (the right to have a State government republican in form and substance, that is subject to the consent of the governed, and the right of the governed to petition their government for a redress of grievances) is the rationale behind this petition for a writ of *certiorari*, based upon the types of constitutional inconsistencies perpetrated by the State of New York -- injustices that obviously demand the attention of the federal courts.

B. THE UNITED STATES CONSTITUTION PROVIDES THAT A CITIZEN OF NEW YORK CAN SUE THE STATE OF NEW YORK IN THE UNITED STATES DISTRICT COURT

Sovereignty is the right to govern; a nation or state-sovereign is the person or persons in whom that resides. In New York, despite massive misunderstanding, it rests with the people.

However, in the practice and even in the science of politics, there has been frequently a strong current in New York against the natural order of things. In New York, which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it.

In New York, plaintiffs and other ordinary, non-aligned citizens have been degraded from the prime rank, which they ought to hold in human affairs.

The state, rather than the people, for whose sakes the state exists, is frequently the object which attracts and arrests the principal attention. This has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state politics. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial language.

Turning to the United States Constitution. The people therein declare, that their design in establishing it, comprehended six objects. First, to form a more perfect union. Second, to establish justice. Third, to ensure domestic tranquillity. Fourth, to provide for the common defense. Fifth, to promote the general welfare. Sixth, to secure the blessings of liberty to themselves and their posterity.

It may be asked, what is the precise sense and latitude in which the words "to establish justice," as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this heading. They are specified in the second section of the third Article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of causes: 1) to all cases arising under this constitution. 2) To all cases arising under the laws of the United States. 3) To all cases arising under treaties made by their authority. 4) To all cases affecting ambassadors, or other public ministers and consuls. 5) To all cases of admiralty and maritime jurisdiction. 6) To controversies to which the United States shall be a party. 7) To controversies between two or more states. 8) To controversies between citizens of different states. 9) To controversies between citizens of the same state, claiming lands under grants of different states. 10) To controversies between a state or the citizens thereof; and foreign states, citizens or subjects. Note: the 11th Amendment removed the last of these

descriptions of causes to which the power of the U.S. Judiciary extends.

Even this summary view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty and the equal right of the people.

We pay particular attention here: a) to that part of the preamble which reads, "To form a union more perfect than before," and "To Establish Justice," "To insure domestic tranquillity," and "To secure the blessings of liberty to ourselves and our posterity," b) to that part of Article III, Section 2 which reads, "To all cases arising under this constitution and the laws of the United States," and c) to that part of Article VI which reads, "The Constitution...shall be the supreme Law of the Land; and the judges in every state shall be bound thereby." Could the people of those states, among whom were those of New York, bind the states and New York among the others, by the legislative, executive and judicial power so vested? This question must unavoidably receive an affirmative answer. If those states were the work of those people, those people and the people of New York, in particular, could alter as they pleased their former work: to any given degree they could diminish as well as enlarge it. Any or all of the former state powers they could extinguish or transfer. The inference, which necessarily results, is, that the Constitution ordained and established by those people; and, in particular by the people of New York, could vest jurisdiction or judicial power over those states and over the State of New York in particular. Has the Constitution done so? Did those people mean to exercise this their undoubted power?

An affirmative answer must be deduced from the declared objects and the general texture of the Constitution of the United States. One of the declared objects is to form a union more perfect than before that time, had been formed. Before that time the union possessed legislative but unenforced legislative power over the states. Nothing could be more natural than to intend that this legislative power should be enforced by powers executive and

judicial. Another declared object is "to establish justice." This points in a particular manner to the judicial authority. And when we view this object in conjunction with the declarations, "that no state shall pass a law impairing the obligation of contracts," and "no state shall enter into any treaty," and "no state shall coin money," and "no state shall keep troops or ships of war in time of peace," and "The United States shall guarantee to every state in this union a republican form of government," and "No person shall be deprived of liberty or money property without constitutional due process," and "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," this object points in a particular manner to the jurisdiction of the court over the several states. What good purpose could the constitutional provision "to establish justice" secure, if a state might pass a law impairing the obligation of contracts, or enter into a treaty, or coin money, or keep a standing army and navy, or arrogate the power of the sovereign into itself, or pass and enforce a law which abridges privileges or immunities of its citizens; and be amenable for such violation of right, to no controlling authority?

A third declared object is, "to ensure domestic tranquillity." This tranquillity is most likely to be disturbed by controversies between states and its citizens when those states abandon the substance and essence of republican principles, becoming tyrannical and despotic, as by routinely turning a blind eye to the will of the people as plainly expressed in the State Constitution, removing the fundamental right of the people to petition the government for a redress of those grievances, and interfering with the people's right to a free election. These consequences will be most peaceably and effectually decided by the establishment and by the exercise of superintending judicial authority. By such exercise and establishment the rule of government, republican in form and substance will be enforced among the several states, in the same manner as municipal law.

A controversy exists between the State of New York and its people involving fundamental republican principles, the natural power of the sovereign and the people's fundamental privileges

and immunities. The controversy involves the degradation of liberty, popular sovereignty and the separation of powers. The controversy is supposed to be brought before those vested with the judicial power of the United States Supreme Court. ***"The judicial power of the United States shall extend to controversies arising under this Constitution."*** Could the strictest legal language describe, with more precise accuracy, the cause now depending on this tribunal? Causes and not parties to causes are weighed by justice in her equal scales. On the former solely her attention is fixed: to the latter she is as she is painted, blind.

CONCLUSION

Plaintiffs respectfully request an order granting the Writ, reversing the order of the U.S. Court of Appeals for the Second Circuit, which dismissed plaintiffs complaint in its entirety for lack of standing, and remanding the matter to the Second Circuit.

DATED: July 4, 1998

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98-84

Appendix A

United States Court of Appeals for the Second Circuit, April 6, 1998

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of April, one thousand nine hundred and ninety-eight.

PRESENT:

HON. WILFRED FEINBERG,
HON. GUIDO CALABRESI,
HON. MYRON H. BRIGHT,*
Circuit Judges.

ROBERT L. SCHULZ and JOHN SALVADOR, Jr.
Plaintiffs-Appellants,

v.

SUMMARY ORDER
97-7952

NEW YORK STATE EXECUTIVE, et al.,
Defendants-Appellees.

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*The Honorable Myron H. Bright, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

For Appellants: ROBERT L. SCHULZ, *pro se*, Queensbury, NY.

For Appellees: FRANK K. WALSH, for DENNIS C. VACCO, Attorney General of the State of New York (PETER H. SCHIFF, of counsel), Albany, NY, *for State Appellees*.
FREDERICK A. O. SCHWARZ, Jr., Cravath, Swaine & Moore, New York, NY, *for Appellees Finnegan and Sheffer*.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*) and was argued.

UPON CONSIDERATION WHEREOF, it is ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Robert L. Schulz, joined by co-plaintiff-appellant John Salvador, Jr., brings this federal action to challenge various laws of the State of New York. Finding their appeal meritless, we affirm the judgment of the district court dismissing their suit.

The complaint in the district court made a myriad of challenges to New York's Clean Water/Clean Air Bond Act of 1996 ("Bond Act"), the Farmer's Protection and Farm Preservation Act ("Farm Act"), and various "General Government Appropriations" bills (including Section 123-b(1) of the New York State Finance Law), as well as claims against state actors who spoke in favor of passing these bills, and a general assault on the proposed New York constitutional convention. The legal theories advanced to support these claims ranged from the frivolous -- for example, that the Farm Act, by treating non-farmers differently from farmers, violates the Equal Protection Clause of the Fourteenth Amendment -- to the exotic -- for instance, that the delegation of authority to the New York State

Constitutional Convention offends the general constitutional principle of "government based upon the consent of the governed."

Among the several grounds upon which we might affirm the district court, *see Alfaro Motors, Inc. v Ward*, 814 F.2d 883, 887 (2d Cir. 1987), we select standing. Appellants simply have not shown the requisite injury for almost all of their claims. "Abstract" and "conjectural" injuries will not support standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Moreover, disgruntled taxpayers may not rely on their remittance of taxes to confer standing, unless they pursue "a 'good-faith pocketbook action,' in which the taxpayer alleges injury to 'a direct and particular financial interest'." *Board of Educ. V. New York State Teachers Retirement Sys.*, 60 F.3d 106, 110 (2d Cir. 1995) (citations omitted).[1]

The only law that appellants might conceivably have standing to challenge is the Farm Act, as they allege actual financial injury by not being able to avail themselves of the tax credits provided by that Act to farmers. We need not decide the matter, however, because their arguments against the Farm Act

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[1] On appeal, appellants have raised Establishment Clause claims. In their complaint, appellants listed numerous appropriations the State made to various religious and non-religious organizations. They now contend that these appropriations are the use of public funds for religious purposes and thus violative of the Establishment Clause. Appropriation of government funds to religious organizations does not constitute a per se violation of the Establishment Clause. Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), appellants must show that the payments have a religious purpose, have the primary effect of advancing religion, or involve an excessive entanglement between the state and religion. *See id.* At 612-13. Appellants neglected to plead any facts or explain in any other way how the appropriations enumerated in their complaint meet any of the requirements established under *Lemon*. Thus, they failed to state a proper claim.

Furthermore, appellants cannot now, for the first time on appeal, raise their Establishment Clause arguments. Because failure to consider this claim will not "result in a possible miscarriage of justice," we decline to address these untimely arguments. *Lionel Corp. v. Civale & Trovato, Inc.*, 29 F.3d 88, 92 (2d Cir. 1994) (internal quotation marks and citation omitted).

lack merit. First, the Privileges and Immunities Clause does not permit individuals to pursue actions against their own states. *See Zobel v. Williams*, 457 U.S. 55, 59 n.5 (1982). Second, the Guarantee Clause does not contemplate the action plaintiffs seek to pursue -- a general exhortation to "rei[]n in" the un-republican government actors of the State of New York -- as was painstakingly explained by the district court. Finally, the Equal Protection Clause does not countenance "non-farmers" as a suspect class (and we decline the invitation to confer that that special status upon them at this time). And, under rational basis review, we agree with the district court that "the support of farmers through tax relief" is an adequate reason for the adoption of this law by the New York legislature.

As for the "government by the consent of the governed claim" which involves a passionate attack on the proposed implementation of the New York State constitutional convention delegation, and a plea for some form of injunctive relief, we cannot say that it gives rise to a sufficiently clear and distinct federal right that might serve as the predicating interest to a cognizable action under 42 U.S. C. Section 1983. *See West v. Atkins*, 487 U.S. 42, 48 (1988). Nor would we find it appropriate for a federal court to invade a state's constitutional affairs in the manner suggested by plaintiffs.

We have analyzed the entire record carefully and cannot find any basis for reversing the court below. We also note that the district court correctly declined to exercise its supplemental jurisdiction over appellants' pendent state-law claims. Accordingly, we order the judgment of the district court to be

AFFIRMED.

For The Court
GEORGE LANGE III
By: Lucille Carr

Appendix B

United States District Court
Northern District of New York
April 12, 1997 Decided
April 14, 1997 Filed

ROBERT L. SCHULZ and JOHN SALVADOR, JR.,
Plaintiffs,

-against-

THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR; MICHAEL FINNEGAN, Chief Counsel to the Governor, and GARY SHEFFER, Spokesman for the Governor; THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, Speaker of the Assembly, and JOSEPH BRUNO, Majority Leader of the Senate; THE NEW YORK STATE UNIFIED COURT SYSTEM, JUDITH KAYE, Chief Judge; THE NEW YORK STATE BOARD OF ELECTIONS, CAROL BERMAN, Chairman, THOMAS WILKEY, Executive Director; and THE NEW YORK STATE BOARD OF CANVASSERS, CAROL BERMAN, Chairman,
Defendants.

96-CV-1595

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK

960 F. Supp. 568; 1997 U.S. Dist. LEXIS 5218

April 12, 1997, Decided
April 14, 1997, FILED

DISPOSITION: [**1] Plaintiffs' Complaint DISMISSED. Plaintiffs' federal claims dismissed with prejudice. Plaintiffs' state law claims dismissed without prejudice.

COUNSEL: Appearances:

ROBERT L. SCHULZ, Plaintiff, Pro se, Queensbury, NY.
JOHN SALVADOR, JR., Plaintiff, Pro se, Lake George, NY.

For Pataki, State Legislature, Unified Court System, defendants: DARREN O'CONNOR, ESQ., DENNIS C. VACCO, Attorney General, Albany, NY.

For Finnegan, Sheffer, defendants: FREDERICK A.O. SCHWARZ, ESQ., CRAVATH, SWAINE & MOORE, New York, NY.

JUDGES: HON. THOMAS J. McAVOY, Chief U.S. District Judge

OPINIONBY: THOMAS J. McAVOY

OPINION: [*570] MEMORANDUM-DECISION and ORDER

The present dispute concerns no less than twelve causes of action challenging, inter alia, the constitutionality of New York's Clean Water/Clean Air Bond Act; New York's Farm Preservation Act; section 123-b of New York's Finance Law; New York's procedure for choosing delegates to its constitutional conventions; and a number of the New York State Legislature's "Member Items." Defendants include the Governor of New York, the Governor's advisors, the New
York State Legislature, key legislators, the New York Unified Court System, and the New York State Board [**2] of Elections. Plaintiffs Robert Schulz and John Salvador, although appearing pro se, are frequent litigators in federal and state court.

Not surprisingly, this case has a long and convoluted history. Plaintiffs' initial foray began on September 19, 1996, in Albany County Supreme Court, and continued to the Appellate Division, Third Department, where [*571]

Plaintiffs' request for a temporary restraining order, barring defendants Pataki, Finnegan, and Sheffer from advocating in favor of the Clean Water/Clean Air Bond Act, was rejected. See Schulz v. New York State Executive, Index No. 5852-96 (Alb. Cty. Sup. Ct. 1996). On October 16, 1996, Plaintiffs discontinued their first state court action and commenced a second state court action seeking similar relief; on October 25, 1996, Justice Teresi denied Plaintiffs' second application for preliminary relief. See Schulz v. New York State Executive, Index No. 6353-96 (Alb. Cty. Sup. Ct. 1996).

Not content to fight this battle on merely one front, Plaintiffs hurried to federal court on October 13, 1996, seeking (1) a declaration that certain actions by the defendants violated the New York State and the United States Constitutions, and [**3] (2) for a temporary restraining order or preliminary injunction enjoining the New York Legislature and Executive from implementing Chapters 412 and 413 of the Laws of 1996 (the "Clean Water/Clean Air Bond Act" hereinafter "Environmental Bond Act").

On October 17, 1996, this Court denied Plaintiffs' application for temporary relief and denied Plaintiffs' attempt to have their motion heard on an expedited basis. See Memorandum-Decision & Order dated October 18, 1996. On October 23, 1996, while the present matter was pending before this Court, Plaintiffs requested for the second time, and were denied, a Temporary Restraining Order in their state court action. Finally, on November 1, 1996, Justice Harris dismissed Plaintiffs' state action in its entirety. See Schulz v. New York State Executive, Index No. 6353-96 (Alb. Cty. Sup. Ct. 1996).

A. The Claims

Although Plaintiffs are concerned with their government's profligate spending, they appear to be less concerned with, or simply incognizant of, the costs associated with their litigating these issues before nine federal and state court judges.

Plaintiffs' Complaint contains both federal and state law causes of action. Although [**4] the Complaint is a model of obfuscation, it appears that Plaintiffs are attempting to implicate four provisions in the United States Constitution: the Constitution's guarantee of a "Republican Form of Government," see Article IV section 4; the "privileges and immunities" clause of the Fourteenth Amendment; the "equal protection" clause of the Fourteenth Amendment; and the First Amendment.

The gravamen of Plaintiffs' state law claims is that the Environmental Bond Act violates the New York State Constitution because the debt it authorizes is not for a "single work or purpose," and its purposes are not "distinctly specified therein." N.Y. CONST. art. VII, @ 11. Plaintiffs also assert that defendants Pataki, Finnegan, and Sheffer violated the New York State Constitution by using public funds and public credit to "exhort the electorate to vote 'yes' on the Bond Act." (Pltfs' Mem. of Law at 44.)

Presently before the Court are Defendants' Motions to Dismiss.

II. DISCUSSION

Initially, it is appropriate to identify certain basic principles that limit the power of every federal court. Unlike their state counterparts, federal courts are not courts of general jurisdiction; [**5] "they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." Bender v. Williamsport Area School Dist., 475 U.S. 534, 540, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986); see also Marbury v. Madison, 5 U.S. 137, 173-180, 2 L. Ed. 60 (1803). For example, prior to 1875, see Act of March 3, 1875, c. 137, 18 Stat. 470, federal courts did not even have original jurisdiction over actions that arose under the Constitution or laws of the United States. See, e.g., Hague v. Committee for Indus. Organization, 307 U.S. 496, 507, 59 S. Ct. 954, 960, 83 L. Ed. 1423 (1939). As Chief Justice Ellsworth succinctly noted in 1799:

Will it be affirmed, that in every case, to which the judicial power of the United States extends, the federal courts may exercise a jurisdiction, without the intervention of the legislature, to distribute and regulate the power? The notion has frequently [*572] been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs [**6] to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant. Turner v. Bank of North America, 4 U.S. 8, 8 1 L. Ed. 718 (1799).

Although there is no consensus as to the framers' intent in creating federal courts of limited jurisdiction, early cases point to a fear of an all powerful federal sovereign. See, e.g., Turner v. Bank of North America, 4 U.S. 8, 8, 1 L. Ed. 718 (1799) ("Congress knew that the English courts have amplified their jurisdiction through the medium of legal fictions; and it was readily foreseen, that by the means of a colorable assignment to an alien, or to the citizen of another state, every controversy arising upon negotiable paper might be drawn into the federal courts."). Indeed, federalism concerns are plainly implicated in more recent cases as well. In Healy v. Ratta, 292 U.S. 263, 54 S. Ct. 700, 78 L. Ed. 1248 [**7] (1934), the Supreme Court stated:

The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. Due regard for the rightful independence of state governments, which should
actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has defined.

Healy, 292 U.S. at 270, 54 S. Ct. at 703 (citations omitted); see also Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379-380, 408, 79 S. Ct. 468, 483-484, 498-499, 3 L. Ed. 2d 368 (1959) (Brennan, J., dissenting and concurring).

Consequently, subject-matter jurisdiction is both an Article III as well as a statutory requirement. Certain legal consequences necessarily follow from this observation. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, see California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972), principles of estoppel [**8] do not apply, see American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S. Ct. 534, 541-542, 95 L. Ed. 702 (1951), and a party does not waive the defense by failing to challenge jurisdiction early in the proceedings. See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104, 72 L. Ed. 2d 492 (1982); Turner, 4 U.S. at 8 ("Silence, inadvertence of consent cannot give jurisdiction, where the law denies it."). Similarly, a court, including an appellate court, must raise lack of subject-matter jurisdiction on its own motion. "The rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 510, 511, 28 L. Ed. 462 (1884).

Accordingly, a federal district court cannot adjudicate every allegation of injustice, no matter how emphatically [**9] a party may argue to the contrary. Moreover, absent a viable basis of federal jurisdiction, a federal court is precluded from entertaining purely state law causes of action. Although under 28 U.S.C. @ 1367(a) district courts have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution," a

district court cannot exercise supplemental jurisdiction unless there is first a proper basis for original federal jurisdiction. [*573] See, e.g., In re Joint Eastern and Southern Dist. Asbestos Litig., 14 F.3d 726, 730 n.2 (2d Cir. 1993) ("the court may not exercise supplemental jurisdiction over claims unless the court has 'original jurisdiction' over at least one of the plaintiff's claims"); Cushing v. Moore, 970 F.2d 1103, 1106 (2d Cir. 1992).

Here, Defendants assert that this Court lacks subject matter jurisdiction to entertain Plaintiffs' claims and that in the alternative, Plaintiffs' claims should be dismissed because they are without merit. "While distinguishing between a dismissal for lack of subject matter jurisdiction [**10] under Rule 12(b)(1) and a dismissal for failure to state a claim under Rule 12(b)(6) appears straightforward in theory, it is often much more difficult in practice." Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996).

Not surprisingly, jurists have long struggled with the difficulty of distinguishing, in federal question cases, between dismissal for lack of subject matter jurisdiction and dismissal on the merits. Justice Holmes described the differences in a federal question case in The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 33 S. Ct. 410, 57 L. Ed. 716 (1913):

If it should appear that the plaintiff was not really relying upon [a federal statute] for his alleged rights, or if the claim of right were frivolous, the case might be dismissed. In the former instance the suit would not really and substantially involve a controversy within the jurisdiction of the court, and in the latter the jurisdiction would not be denied, except possibly in form.

228 U.S. at 25, 33 S. Ct. at 411-12 (citations omitted).

Distinguishing the basis of dismissal is particularly difficult in cases involving federal question jurisdiction under 28 [**11] U.S.C. @ 1331, where the very statute that creates the cause of action often confers jurisdiction as well. Justice Black framed the analysis as follows:

> If the court [exercises] its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Bell v. Hood, 327 U.S. 678, 682-83, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1946) (citations and footnote omitted).

Although the federal courts have followed a general practice of granting jurisdiction in most cases and dismissing for lack of subject matter jurisdiction only under narrow circumstances, see Spencer v. Casavilla, 903 F.2d 171, 173 (2d Cir. 1990); Goldman v. Gallant Sec., Inc., 878 F.2d 71, 73 (2d Cir. 1989) (per curiam); Lewis v. Knutson, 699 F.2d 230, 237 (5th Cir. [**12] 1983), a court must nevertheless dismiss for lack of subject matter jurisdiction--even if a federal claim is asserted on the face of the complaint--where the federal question "is so plainly insubstantial as to be devoid of any merits and thus [does] not present[] any issue worthy of adjudication." Giulini v. Blessing, 654 F.2d 189, 192 (2d Cir. 1981); see also Nowak, 81 F.3d at 1188; Town of West Hartford v. Operation Rescue, 915 F.2d 92, 100 (2d Cir. 1990).

As the Second Circuit has stated, the test "is whether the federal . . .claim was so insubstantial, implausible, or otherwise completely devoid of merit as not to involve a federal controversy." IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056 (2d Cir. 1993); see also AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148, 152-53 (2d Cir. 1984) ("when the contested basis of federal jurisdiction is also an element of plaintiff's asserted federal claim, the claim should not be dismissed for want of jurisdiction except when it appears to be immaterial and made solely for the purpose of obtaining

jurisdiction or where such a claim is wholly insubstantial and frivolous") (internal quotation marks [**13] omitted).

Accordingly, the Court will initially focus on Plaintiffs' federal claims, and with the [*574] foregoing standard in mind, will address Defendants' Motions to Dismiss.

A. Motion To Dismiss

Rule 12 of the Federal Rules of Civil Procedure provides that a cause of action shall be dismissed if the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Furthermore, a case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the court lacks the statutory or constitutional power to adjudicate the case.

In analyzing a motion to dismiss, the facts alleged by the plaintiff are assumed to be true and must be liberally construed in the light most favorable to the plaintiff. See, e.g., Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991), cert. denied, 504 U.S. 911, 118 L. Ed. 2d 548, 112 S. Ct. 1943 (1992). While the court need not accept mere conclusions of law, the court should acceptthe pleader's description of what happened along with any conclusions that can reasonably be drawn therefrom. See Murray v. City of Milford, 380 F.2d 468 (2d Cir. 1967).

Furthermore, when a party makes a motion [**14] to dismiss, the court will limit its consideration to the facts asserted on the face of the complaint. Cosmas v. Hassett, 886 F.2d 8, 13 (2d Cir. 1989). A complaint will not be dismissed for failure to state a claim unless it appears, beyond a doubt, that the plaintiff can prove no set of facts that would entitle them to relief. See Wanamaker v. Columbian Rope Co., 740 F. Supp. 127 (N.D.N.Y. 1990).

B. Plaintiffs' Federal Claims

As previously discussed, Plaintiffs' Complaint must present a viable form of federal jurisdiction. Because Plaintiffs and

Defendants are all citizens of New York, there is no basis for diversity jurisdiction, see 28 U.S.C. @ 1332, and thus the Court's jurisdiction must be predicated on federal question jurisdiction. See 28 U.S.C. @ 1331.

Plaintiffs attempt to implicate four provisions in the United States Constitution: the Constitution's guarantee of a "Republican Form of Government"; the "privileges and immunities" clause of the Fourteenth Amendment; the "equal protection" clause of the Fourteenth Amendment; and the First Amendment. Specifically, Plaintiffs assert that: the New York Farm Act, which provides property tax credits for [**15] agricultural land, violates the Republican Form of Government Clause of Article IV, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment because it "discriminate[s] against plaintiffs and all other non-farmers" (Complaint P 63); the provision of "thousands of 'member item' gifts" by state legislators violates the First Amendment, denies Plaintiffs their right to a republican form of government, and denies Plaintiffs the privileges and immunities of citizenship--although Plaintiffs' do not specifically state in their Complaint how these constitutional provisions are violated; the "taxpayer standing" rule in section 123-b of the State Finance Law violates the First Amendment, denies Plaintiffs their right to a republican form of government, and denies them the privileges and immunities of citizenship because it does not confer standing to challenge a bond issue; the Environmental Bond Act denies Plaintiffs their right to a republican form of government and denies them the privileges and immunities of citizenship because the Bond Act
violates the New York State Constitution; and, finally, New York's procedure for [**16] choosing delegates to its constitutional conventions denies Plaintiffs their right to a republican form of government.

i. Guarantee Clause

Plaintiffs argue that the New York Farm Act, "member item gifts" by state legislators, the State Finance Law, New York's

Environmental Bond Act, and New York's procedure for choosing delegates to its constitutional conventions deny Plaintiffs their *right to a republican form of government*.

Article IV, section 4 of the United States Constitution provides that the United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application [*575] of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, @ 4. Not surprisingly, the Guarantee Clause has been an infrequent subject of litigation. Accordingly, the Supreme Court has warned:

We approach the issue with some trepidation, because the Guarantee Clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the [**17] claims presented to be nonjusticiable under the "political question" doctrine.

New York v. U.S., 505 U.S. 144, 184, 112 S. Ct. 2408, 2432, 120 L. Ed. 2d 120 (1992) (citing City of Rome v. United States, 446 U.S. 156, 182, n.17, 100 S. Ct. 1548, 1564, n.17, 64 L. Ed. 2d 119 (1980) (challenge to the preclearance requirements of the Voting Rights Act); Baker v. Carr, 369 U.S. 186, 218-229, 82 S. Ct. 691, 710-716, 7 L. Ed. 2d 663 (1962) (challenge to apportionment of state legislative districts); Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 140-151, 32 S. Ct. 224, 227-231, 56 L. Ed. 377 (1912) (challenge to initiative and referendum provisions of state constitution)).

The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in Luther v. Borden, 48 U.S. 1, 12 L. Ed. 581 (1849), where the Court was asked to decide, in the wake of Dorr's Rebellion, which of two rival governments was the legitimate government of Rhode Island. The Court held that "it rests with Congress," not the judiciary, "to

decide what government is the established one in a State." 48 U.S. at 42. Although over the following [**18] century this limited holding transformed into the general rule that "violation of the great guaranty of a republican form of government in States cannot be challenged in the courts," Colegrove v. Green, 328 U.S. 549, 556, 66 S. Ct. 1198, 1201, 90 L. Ed. 1432 (1946) (plurality opinion), this view has not always been accepted. In a group of cases decided before the holding of Luther became a general rule of nonjusticiability, the Supreme Court addressed the merits of claims founded on the Guarantee Clause without any suggestion that the claims were non-justiciable. See Kies v. Lowrey, 199 U.S. 233, 239, 26 S. Ct. 27, 29, 50 L. Ed. 167 (1905); Forsyth v. Hammond, 166 U.S. 506, 519, 17 S. Ct. 665, 670, 41 L. Ed. 1095 (1897); In re Duncan, 139 U.S. 449, 461-462, 11 S. Ct. 573, 577, 35 L. Ed. 219 (1891); Minor v. Happersett, 88 U.S. 162, 175-176, 22 L. Ed. 627 (1875).

In New York v. United States, the Supreme Court's most recent exposition on
this issue, the Court discussed, but did not resolve, the question of when claims under the Guarantee Clause are justiciable. 505 U.S. at 182-86, 112 S. Ct. at 2432-33. Although the New York Court noted that [**19] since its decision in Luther most courts have concluded that violations of the Guarantee Clause cannot be challenged in the courts because they present nonjusticiable political questions, "not all claims under the Guarantee Clause present nonjusticiable political questions." New York, 505 U.S. at 184-85, 112 S. Ct. At 2433. Nonetheless, the New York Court ultimately found it unnecessary to "resolve this difficult question." 505 U.S. at 184-85, 112 S. Ct. at 2433.

The Second Circuit has been equally reticent in resolving the issue of when the Guarantee Clause presents a nonjusticiable political question. In Padavan v. U.S., 82 F.3d 23 (2d Cir. 1996) the Second Circuit noted that "while it is possible that 'perhaps not all claims under the Guarantee Clause present nonjusticiable political questions,' there is no basis for us to say that the plaintiffs here have presented a justiciable claim." Id. at 28

(addressing whether federal immigration policies deprived New York State of a republican
form of government). Accordingly, this Court is left with scant guidance in determining when the general rule of nonjusticiability should be abrogated.

Furthermore, Plaintiffs [**20] themselves provide little aid in the Court's resolution of this issue; they offer no further explanation of their argument nor do they cite any relevant case law in support of their position. The Court can find few cases where the Guarantee Clause has been invoked to invalidate the actions of a state itself. On the contrary, when the Guarantee Clause is invoked, it is [*576] invariably done so in an effort to challenge an action of the federal government. See, e.g., In re Duncan, 139 U.S. 449, 461, 11 S. Ct. 573, 577, 35 L. Ed. 219 (1891) (addressing rights of states to choose their own government officials and pass their own laws); Bauers v. Heisel, 361 F.2d 581, 588 (3d Cir. 1966) (separate and independent state judiciary); Taylor v. Beckham, 178 U.S. 548, 570-71, 20 S. Ct. 890, 898-99, 44 L. Ed. 1187 (1900) (prescribing the qualifications of state officers); U.S. v. Downey, 195 F. Supp. 581, 585 (S.D.Ill. 1961)(addressing right of state courts to be free of federally imposed rules of criminal procedure).

In light of the Guarantee Clauses' implicit protection of state governmental processes from the tyranny of an all-powerful federal sovereign, it would seem imprudent [**21] on the part of the federal judiciary to allow the Clause to be used to challenge a state's own lawmaking. For example, in 1912, the Supreme Court addressed a challenge to the referendum provisions of the Oregon Constitution. See Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912). Chief Justice White, writing for the majority, found the challenge nonjusticiable and described the claim as follows:

It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power, assailed on the ground that its exertion has injuriously affected the rights of an

individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form.

Pacific States Telephone & Telegraph, 223 U.S. at 150-51, 32 S. Ct. at 231. Such a claim, the Court concluded is "political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress." Pacific States Telephone & Telegraph, [**22] 223 U.S. at 133, 32 S. Ct. at 224. Furthermore, the Tenth Circuit, in addressing the purpose of the Guarantee Clause noted:

In American Constitutional Law @ 5-23, the Guarantee Clause is discussed in the following manner:

The most fundamental threats to state sovereignty--those that genuinely portend reduction of the states into "field offices of the national bureaucracy" or "bureaucratic puppets of the Federal Government"--would seem to arise less from federal laws that impose substantive constraints on state and private actors alike . . . than from federal laws that restructure the basic institutional design of the system a state's people choose for governing themselves. If there is any form of congressional assault that might truly "'nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell,'" it is an assault on those democratic processes through [which] citizens . . . retain the power to govern. Kelley v. U.S., 69 F.3d 1503, 1510-11 (10th Cir. 1995), cert. denied sub nom, Kelley v. Department of Justice, 134 L. Ed. 2d 665, 116 S. Ct. 1566 (1996).

Consequently, there is no basis for this Court to [**23] conclude that Plaintiffs have presented a justiciable claim. Thus, Plaintiffs' claims implicating the Guarantee Clause must be dismissed.

ii. Privileges and Immunities Clause

Plaintiffs also argue that the New York Farm Act, "member item gifts" by state legislators, the State Finance Law, and New

York's Environmental Bond Act deny Plaintiffs their privileges and immunities of citizenship.

Article IV, @ 2, cl. 1, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The provision was designed "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." Paul v. Virginia, (8 Wall.) 168, 180 (1869); see also Toomer v. Witsell, 334 U.S. 385, 395, 68 S. Ct. 1156, 1162, 92 L. Ed. 1460 (1948). As [*577] Justice Bradley remarked in the Slaughter House Case:

The "privileges and immunities" secured by the original constitution, were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens, and against the [**24] citizens of other states.

But the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.

Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 1 Abb. 388, 15 F. Cas. 649, 652 (C.C.La. 1870) (No. 8408).

Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union. n1 See Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279-80, 105 S. Ct. 1272, 1276, 84 L. Ed. 2d 205 (1985). Indeed, Charles Pinckney, who drafted the original Privileges and Immunities Clause, stated that it was "formed exactly upon the principles of the 4th article of the present Confederation." 3 M.

Farrand, Records of the Federal Convention of 1787, p. 112 (1911).

----------Footnotes----------

n1 Article IV of the Articles of Confederation provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States ... shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof . . .

----------End Footnotes----------

However, the Privileges and Immunities Clause does not infuse citizens with new and independent rights. The Clause "establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment." Austin v. New Hampshire, 420 U.S. 656, 660, 95 S. Ct. 1191, 1194, 43 L. Ed. 2d 530 (1975). Justice Miller made this distinction explicit in Bradwell v. State of Illinois, 83 U.S. 130, 138, 21 L. Ed. 442 (1872), where, speaking of the privileges and immunities provision he said that "the protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation." More than fifty years later, Justice Sutherland noted:

This does not mean that a state has unlimited power by law to abridge the privileges of its own citizens. It only means that in such case we must look elsewhere than to the language of the privileges and immunities clause of the Fourth Article of the Constitution for the constitutional infirmity of the statute, if it have any.

Colgate v. Harvey, 296 U.S. 404, 428-29, 56 S. Ct. 252, 258, 80 L. Ed. 299 (1935)

More recently, in Zobel v. Williams, the Supreme Court rejected a challenge to Alaska's dividend scheme, which provided for proportional payments based on length of residency within the state, holding:

The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. That Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395, 68 S. Ct. 1156, 1161, 92 L. Ed. 1460 (1948). The Clause is thus not applicable to this case. . . . When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

457 U.S. 55, 59, 102 S. Ct. 2309, 2312, 72 L. Ed. 2d 672 (1982).

Therefore, as citizens of the State of New York challenging the legislative and executive actions of their own state, Plaintiffs have no recourse to the Privileges and Immunities Clause. Accordingly, Plaintiffs' claims implicating the Privileges and Immunities Clause must also be dismissed.

iii. Equal Protection

Plaintiffs argue that the New York Farm Act, which provides property tax credits for agricultural land, violates the Equal Protection Clause of the Fourteenth Amendment because it "discriminate[s] against plaintiffs and all other non-farmers" (Complaint P 63). Essentially, Plaintiffs, who are neither farmers nor owners of agricultural land, assert that their constitutional rights are violated because "the statutory classification is . . . based upon a 'suspect classification,' i.e., political favoritism." (Pltfs' Mem. of Law at 16).

Defendants correctly note that Plaintiffs' burden in pleading that a statute violates the Equal Protection Clause requires more than their pointing out that the statute creates a classification. Indeed, it is the very nature of legislation to classify. See, e.g., Lyng v. Automobile Workers, 485 U.S. 360, 370, 108 S. Ct. 1184, 1192, 99 L. Ed. 2d 380 ("drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one"); Massachusetts Board of [**28] Regents v. Murgia, 427 U.S. 307, 314, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976).

Moreover, tax legislation enjoys the greatest degree of freedom to classify. For example, in Madden v. Kentucky, 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1940), the Supreme Court reasoned:

The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that "the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation," and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. . . . It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Id. at 87-88, 60 S. Ct. at 408. Accordingly, the Madden Court held that "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." 309 U.S. at 88, 60 S. Ct. at 408.

Plaintiffs specious argument that New York's Farm Act violates the Equal Protection Clause, because the statutory classification is a "suspect classification," demonstrates Plaintiffs' utter disregard for constitutional jurisprudence on this issue.

The concept of a "suspect classification" saw its genesis in the famous Carolene Products footnote. In United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), the Court wrote that it did not have to inquire "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Carolene Products, 304 U.S. at 152-153 n.4, 58 S. Ct. at 783 n.4.

Here, it is ludicrous to consider non-farmers a "discrete and insular minority" unable to employ the "political processes ordinarily to be relied upon," when non-farmers clearly constitute a majority of the electorate. Although courts have at times used an intermediate standard of review for gender-based classifications, see, e.g., Craig v. Boren, 429 U.S. 190, 204, 97 S. Ct. 451, 460, 50 L. Ed. 2d 397 (1976), and occasionally an undefined, but heightened, review standard for classifications based on illegitimacy, see L. Tribe, American Constitutional Law @ 16-23, at 1057 (1978), there are only three suspect classifications: race, alienage, and national origin. See City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985) (recognizing only race, alienage, and national origin as suspect classifications).

[*579] Consequently, Plaintiffs' impassioned attempt to convince this Court that non-farmers are a suspect classification under the Equal Protection Clause necessarily must fail along with the many other classifications that courts havedeemed non-suspect. To illustrate, age is not a suspect classification, see Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-314, 96 S. Ct. 2562, 2566-2567, 49 L. Ed. 2d 520 (1976), classification based on choice of sexual partners is not a suspect classification, [**31] see National Gay Task Force v. Bd. of Educ. of City of Oklahoma City, 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd, 470 U.S. 903, 105 S. Ct. 1858, 84 L. Ed. 2d 776 (1985), the classification between prison escapees and other fugitives is not a suspect classification, see Beauchamp v.

Murphy, 37 F.3d 700, 707 (1st Cir. 1994), juvenile delinquency is not a suspect classification, see United States ex rel. Martin v. Strasburg, 513 F. Supp. 691, 706 (S.D.N.Y. 1981), aff'd, 689 F.2d 365, 374 (2d Cir. 1982), rev'd on other grounds sub nom, Schall v. Martin, 467 U.S. 253, 281, 104 S. Ct. 2403, 2418, 81 L. Ed. 2d 207 (1984), students of unaccredited law schools are not a suspect classification, see Lupert v. California State Bar, 761 F.2d 1325, 1328 (9th Cir. 1985), and seamen are not a suspect class. See Jones v. Reagan, 748 F.2d 1331, 1337 (9th Cir. 1984).

It is equally plain that Plaintiffs do not have a fundamental interest in holding on to their tax dollars. Accordingly, "in cases where a classification burdens neither a suspect group nor a fundamental interest, 'courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.'" Gregory v. Ashcroft, 501 U.S. 452, 470-71, 111 S. Ct. 2395, 2406, 115 L. Ed. 2d 410 (1991) (quoting Murgia, 427 U.S. at 314, 96 S. Ct. at 2567).

Because there is no suspect classification involved, nor any deprivation of fundamental rights, the ordinary equal protection test is extremely deferential: a non-suspect classification is unconstitutional only if no legitimate basis can
be found to support it. See, e.g., Harrah Independent School District v. Martin, 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1979). "Support" means only that a legislature could provide a rational basis for the choice. See, e.g., Vance v. Bradley, 440 U.S. 93, 111, 99 S. Ct. 939, 949, 59 L. Ed. 2d 171 (1979).

Applying this deferential standard to the facts here, the Court can only conclude that the Farm Act is rationally related to a legitimate governmental purpose: the support of farmers and farming through tax relief. (See Defs' Appendix 5; New York Agricultural Statistics 1994-1996 and 1995-1996). Thus, Plaintiffs' cause of action challenging New York's Farm Act is dismissed.

iv. First Amendment

Plaintiffs only remaining federal claim is that defendants Pataki, Finnegan, and Sheffer's advocacy in favor of the Environmental Bond Act violated Plaintiffs' right to "cast an effective vote, the right to a free election, and the right to advance political ideas." (Pltfs' Mem. of Law at 12). In addition, Plaintiffs argue that "those rights were denied by defendants Pataki, Finnegan and Sheffer as they propagandized for the vote and as they actively campaigned for passage of the Bond Act and exhorted the electorate to 'vote yes'." (Pltfs' Mem. of Law at 12).

However, Plaintiffs offer no further explanation of their argument nor do they cite any relevant case law in support of their position. n2 Moreover, the Court can find no precedent for the assertion that a party's political advocacy can affirmatively infringe another's First Amendment right to free speech or a free election. Indeed, to accept this argument, the Court would necessarily be limiting the free speech rights of defendants Pataki, Sheffer, and Finnegan; a position that the First Amendment, and this Court, will not countenance.

----------Footnotes----------

n2 Plaintiffs argument that defendants Pataki, Finnegan, and Sheffer's advocacy violates the New York Constitution and thus the First Amendment is also unavailing. Notwithstanding the fact that it is dubious whether defendants acted in contravention of the New York Constitution, there is simply no basis for the assertion that the federal constitution prohibits individuals, including state actors acting in contravention of a state constitution, from expressing their personal beliefs regarding pending legislation or referenda. Plaintiffs' attempt to "bootstrap" their state law claim into the First Amendment must be rejected.

----------End Footnotes----------

Accordingly, Plaintiffs' First Amendment claims are without merit and must also be dismissed.

C. Plaintiffs' State Law Claims

As noted previously, federal courts are courts of limited jurisdiction. Thus, in order to address Plaintiffs' state law causes of action, a two-fold inquiry must initially be made: (1) whether this Court has the judicial power to decide the state law claim, and (2) assuming such power exists, whether this Court should, in the exercise of its discretion, decline Plaintiffs' invitation to adjudicate the state law claims.

In Osborn v. Bank of the United States, 22 U.S. 738, 6 L. Ed. 204 (1824), Chief Justice Marshal wrote:

When a question to which the judicial power of the union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that case, although other questions of fact or law may be involved in it.

22 U.S. at 823. Although this concept of pendent jurisdiction was born in the early part of the 19th Century, it has proved a troublesome concept to apply. In United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, [**35] 16 L. Ed. 2d 218 (1976), the Supreme Court formulated the current standard to determine when a district court possesses the judicial power to exercise jurisdiction over a pendant state claim: "The Federal claim must have substance sufficient to confer subject matter jurisdiction on the court [and] the state and federal claims must derive from a common nucleus of operative fact." Gibbs, 383 U.S. at 725, 86 S. Ct. at 1138.

As to the first prong of this standard, in the Second Circuit the test "is whether the federal . . . claim [is] so insubstantial, implausible, or otherwise completely devoid of merit as not to involve a federal controversy." IUE AFL-CIO Pension Fund, 9 F.3d at 1056. As discussed previously, Plaintiffs' claims implicating the Guarantee Clause, Privileges and Immunities Clause, Equal Protection Clause, and First Amendment are completely devoid of merit.

However, the Court need not determine conclusively whether Plaintiffs' claims are so insubstantial as to negate federal jurisdiction because pendent jurisdiction is a matter of judicial discretion. The Court in Gibbs stated that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726, 86 S. Ct. at 1139. Even before Congress passed the supplemental jurisdiction statute, see 28 U.S.C. @ 1367, courts in this circuit, with rare exception, adhered to the rationale articulated in Gibbs. See Crane Co. v. American Standard, Inc., 603 F.2d 244, 245 (2d Cir. 1979) ("pendent state claims must be dismissed if it later is determined that there never existed a federal claim sufficient to invoke the jurisdiction of the federal court."); Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970); Rogers v. Valentine, 426 F.2d 1361 (2d Cir. 1970) (no abuse of discretion to refuse to exercise pendent jurisdiction after dismissal of federal claim).

Under 28 U.S.C. @ 1367, "the district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. @ 1376(c). Moreover, the Court notes that "needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." Gibbs, 383 U.S. at 726; see also Young v. New York City Transit Authority, 903 F.2d 146, 163-64 (2d Cir. 1990). "A district court ought not 'reach out for . . . issues, thereby depriving state courts of opportunities to develop and apply state law.'" Young, 903 F.2d at 164 (quoting Mayer v. Oil Field Systems Corp., 803 F.2d 749, 757 (2d Cir. 1986)).

Furthermore, exercising supplemental jurisdiction over claims based on the New York Constitution "would violate fundamental principles of federalism and comity" because "New York State has a definite interest in determining whether its own laws comport with the New York Constitution." Young, 903 F.2d at 163-64; see also 28 U.S.C. @ 1367(c)(1) (district courts may

decline to exercise supplemental jurisdiction if "the claim raises a novel or complex issue of State law").

Therefore, in light of the dismissal of all federal claims in this action, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims.

III. CONCLUSION

It is therefore ORDERED, that Plaintiffs' Complaint is DISMISSED in its entirety. Plaintiffs' federal claims are dismissed with prejudice.

Plaintiffs' state law claims are dismissed without prejudice.

IT IS SO ORDERED.

April 12, 1997
Binghamton, New York

HON. THOMAS J. McAVOY

Chief U.S. District Judge

Appendix C

New York State Court of Appeals

IN THE MATTER OF ROBERT SCHULZ ET AL., APPELLANTS, v. NEW YORK STATE EXECUTIVE, ET AL., RESPONDENTS.

98 N.Y. Int. 0067.
June 9, 1998

3 No. 47

[98 NY Int. 0067]
Decided June 9, 1998

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Robert L. Schulz, pro se, appellant.
Denise A. Hartman, for respondents Pataki, Silver & Bruno.
Submitted by Frederick A.O. Schwarz, Jr., for respondents Finnegan & Sheffer.

KAYE, CHIEF JUDGE:
The Clean Water/Clean Air Bond Act of 1996 (the "Bond Act") passed by the Legislature, signed by the Governor and approved by referendum at the November 1996 general election authorized the creation of a State general obligation debt of $1,750,000,000 to be used "for the single purpose of preserving, enhancing, restoring, and improving the quality of the state's environment" (L 1996, ch 412, § 2). At the same time, the Legislature amended the Environmental Conservation Law, adding a new article 56 to implement the Bond Act (L 1996, ch 413).

The Bond Act specified that the moneys received from the sale of the bonds would be expended to create a safe drinking water program ($355 million); to fund projects related to the

improvement and enhancement of water quality including programs focused on open space land conservation, parks, historic preservation and heritage areas ($790 million); to improve solid waste facilities ($175 million); to restore contaminated properties ($200 million); and to improve and enhance air quality ($230 million) (L 1996, ch 412, §4). The implementing legislation particularized how the bond proceeds would be allocated and expended, including funding for the Hudson River estuary plan, the Department of Environmental Conservation's "great lakes program," landfill closure efforts in New York City, municipal recycling projects, environmental restoration projects, and comprehensive conservation and management plans for the Long Island Sound, Lake Champlain, Onondaga Lake, the New York/New Jersey Harbor and the Peconic Estuary.

In October 1996, petitioners commenced this combined declaratory judgment action and article 78 proceeding for adetermination that the Bond Act and its related implementing provisions violate article VII, § 11 and article III, § 16 of the New York State Constitution. Petitioners subsequently sought both summary judgment and a preliminary injunction to remove the referendum from the ballot. Respondents, in turn, moved to dismiss on a number of threshold grounds.

Supreme Court, after a hearing, denied petitioners' request for an injunction, determined that petitioners lacked standing and concluded that the Bond Act did not violate the cited constitutional provisions. After we transferred petitioners' direct appeal to the Appellate Division (89 NY2d 933), that court while finding standing to assert a challenge under article VII, § 11 of the State Constitution affirmed. Petitioners appealed as of right pursuant to CPLR 5601(b)(1). [n.1] Agreeing with the Appellate Division, we now affirm.

Single Work or Purpose Requirement

We first consider the threshold issue of standing to challenge the Bond Act as violative of the "single work or purpose" requirement set forth in article VII, § 11 of the StateConstitution. [n.2]

As a general principle, citizen taxpayer status does not confer standing to challenge the issuance of State bond acts. That principle is grounded on a recognition that such lawsuits "increase the cost of raising the revenue by creating uncertainty in the minds of potential investors" (see, Wein v Comptroller of State of New York, 46 NY2d 394, 400; State Finance Law § 123 b[1]). As we held in Matter of Schulz v New York State (81 NY2d 336, 344 347, cert denied 513 US 1127 [" Schulz I"]), however, there are limited instances when a voter may challenge a bond issue on the basis that it infringes upon explicit voter protections provided by article VII, § 11 of the State Constitution. Such an instance is presented by petitioners' first challenge.

Article VII, § 11, which sets forth the prerequisite of a public referendum for all proposed long term public debt, also mandates that proposed public financing schemes must be "for some single work or purpose, to be distinctly specified therein." That requirement prevents the Executive and Legislative branches of our State government from embracing in one bond act several distinct and unrelated purposes, none or some of which could singly obtain referendum approval (see, Problems Relating toTaxation and Finance, 1938 New York State Constitutional Convention Committee Report, vol
X, p. 87 [the "Poletti Report"]). By restricting each bond act to a single work or purpose, referendum approval cannot be procured by combining the votes of several different groups, each with an interest in one of the bond act's multiple purposes, and thereby creating a majority that will approve them all (see, New York Pub. Interest Research Grp., Inc. v Carey, 59 AD2d 172, 176, rev'd on other grds 42 NY2d 527).

The requirement also assures that several different purposes some of which are not independently worthy of referendum approval will not be combined in a single bond act in the hopes that the voters will not separately evaluate the relative merit and strength

of each purpose. If voters could not bring a claim for violation of that clause, the Executive and Legislative branches could safely ignore it altogether, and referendum approval garnered from voters unable to cast an intelligent ballot would be reduced to a "meaningless charade" (__ AD2d __, __).

While petitioners may have standing to assert this particular claim, their argument nonetheless fails on the merits. Petitioners argue that the Bond Act, when read in conjunction with its implementing legislation, impermissibly authorizes the use of bond proceeds for a multitude of unrelated projects, rendering voters at the November 1996 referendum unable to"intelligently evaluate and appraise the single purpose" of the proposed public debt.

Petitioners' primary support for this argument is People ex rel. Hopkins v Board of Supervisors of Kings County (52 NY 556, 561), an 1873 case in which this Court concluded that a bond act was unconstitutional, and therefore invalid, because its "appropriations [were] in fact many, and their objects many and diverse." When Hopkins was decided, article VII, § 12 of the State Constitution restricted the acquisition of public debt in a number of ways: requiring voter approval of bond issuances, directing that only one bond act at a time could be submitted for such approval and limiting the subject matter of each bond act to a "single work or object." Originally adopted in 1846, these constitutional mandates were intended to stem the extensive, unwise government borrowing practices that had caused serious financial problems in the 1840s.

By the early 1900s, however, it was apparent that the "single work or object" clause was too restrictive and unwieldy. Interpreted as only permitting bond issuances for a single physical structure, the requirement severely hampered the State's ability to build roads, develop parks and supply other desperately needed public works (see, 1915 Revised Record of the New York State Constitutional Convention, vol II, pp. 1295 1299 [remarks of Delegate Alfred E. Smith, et al.]; Poletti Report, vol X, pp. 90 96, supra). Accordingly, at the Constitutional Convention of 1938,

the "single work or object" language was replaced with the current "single work or purpose." That revision was intended to create a more flexible standard and "remove any doubt that may exist as to the power of the State to contract a debt for some single objective that may relate to more than one physical structure or, indeed, as in the case of relief bonds, may not include a physical structure" (see, Journal of the Constitutional Convention of the State of New York, 1938, Doc. No. 3, pp. 6 7).

While broader than its predecessor, the clause still precludes the Legislative and Executive branches from proposing bond issues aimed at "purposes" that are so imprecise as to be essentially generic, thereby allowing funding of a host of projects having no discernible common theme (see, e.g., New York Pub. Interest Research Grp., Inc. v Carey, 59 AD2d at 173 174, 176 177, supra [bond issue for "comprehensive economic development" where the funding was earmarked for four different areas of "development" including industrial development, environmental projects, tourism and transportation was struck down because the areas were "not so naturally and necessarily related to each other as to constitute a single purpose within the meaning of the Constitution"]). Indeed, application of the more flexible "single work or purpose" standard of article VII, § 11 has produced results that are profoundly different from those ensuing from the more rigid requirement in effect when Hopkins was decided. It is now possible, for example, to fund a number of different projects through a single issue, so long as those projects have a common goal (New York Pub. Interest Grp., Inc. v Carey, 59 AD2d at 175 176, supra). Petitioners' reliance on Hopkins, applying article VII, § 12's outdated "single work or object" requirement, is plainly misplaced. [n.3]

The Bond Act at issue in this dispute satisfies the modern constitutional standard. The Act authorizes the creation of State indebtedness for projects in a number of subcategories, all of which are directly related to the single categorical purpose of improving the State's environment. Each of the subcategories safe drinking water, improvement of solid waste facilities, remediation of contaminated properties, enhancement of air and water quality,

and preservation of open spaces, parks and historic sites is naturally and logically related to the stated unitary goal of "preserving, enhancing, restoring and improving" the environment (L 1996, ch 412, §2). Thus, the "single work or purpose" requirement is satisfied.

We note that, contrary to petitioners' argument, the preservation and restoration of parks, open spaces and sites connected with our historical and cultural heritage have long been considered part and parcel of the State's overall environmental management plan. The State Environmental Quality Review Act mandates consideration of "objects of historic or aesthetic significance" that may be affected by a proposed project (ECL 8 0105[6]; see also, 6 NYCRR § 617.4[a][9] [projects having an impact on historic sites are Type I actions]), and the Legislature has specifically linked the State's "invaluable natural and historic resources" as "key components of the environmental and social policy of the state" (Environmental Protection Act of 1993, L 1993, ch 610, § 2, codified at ECL art 54 [emphasis supplied]). Furthermore, section 14.01 of the Parks, Recreation and Historic Preservation Law recognizes that historical, archaeological, architectural and cultural heritage sites are "among the most important environmental assets" the State has. Thus, there is nothing dissonant about including projects related to the preservation of such sites in a Bond Act aimed at conserving and improving the environment.

Inasmuch as the Clean Water/Clean Air Bond Act of 1996 is aimed at a single purpose "preserving, enhancing, restoring, and improving the State's environment" and that purpose is clearly set forth in the Bond Act itself, there is no merit to petitioners' additional contention that that provision fails to satisfy the constitutional requirement that the purpose of the debt be "distinctly specified" in the act (NY Const, art VII, § 11). That the particular projects for which the proceeds were tobe appropriated are listed in a separate legislative enactment is of no legal consequence in this context because the Constitution requires only that the bond act "distinctly specif[y]" the "single work or purpose" of the bond issue; it does not require a listing of

the myriad activities to be undertaken in the service of that work or purpose. Indeed, a rule that would require a detailed enumeration of each and every funded project in the bond act itself would lead to clotted verbiage and unwieldy ballot submissions, thereby defeating the primary purpose of article VII, § 11.

Thus, we conclude that the Bond Act does not violate the "single work or purpose clause" of article VII, § 11 of the State Constitution.

Incorporation by Reference

Petitioners next challenge the Bond Act as violative of article III, § 16 of the State Constitution, which provides: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act." They urge that the Bond Act is constitutionally flawed because it requires reference to separate provisions of its implementing legislation without explicitly incorporating the terms of that enactment.

As with petitioners' first argument, standing is a threshold determination, and here we conclude that they lack standing to maintain this claim. Although voters may have standing to challenge the constitutionality of the Bond Act on the ground that a voter protection dictated by article VII, §11 was denied, it does not follow that they also can challenge the Bond Act under the very different provisions of article III, § 16. Indeed, the purpose of article III, § 16 is not related in any way to the exercise of referendum rights, but rather prevents "the Legislature from incorporating into its acts the provisions of other statutes or regulations which affect public or private interests in ways not disclosed upon the face of the act, and which would not have received the sanction of the Legislature if fully understood by it" (Matter of Medical Socy. of the State of New York v State of New York Dept. of Health, 83 NY2d 447, 452 453 [emphasis supplied]). Thus, the "evil" that article III, § 16 was intended to

address is "the possibility of * * * misapprehension or unawareness" among State legislators, not citizens voting in a referendum (id. at 453).

Nor are we persuaded by petitioners' alternative argument that voter standing exists so long as the referendum requirement of article VII, § 11 applies, even if the underlying challenge to the statute is based upon a different provision of the State Constitution. That position, wholly at odds with the first principle that citizen taxpayers do not as a rule have standing to challenge bond issues, would allow innumerable bond act challenges to be slipped under the blanket of an article VII, § 11 challenge (Wein, 46 NY2d at 400, supra). In that petitioners lack standing, we do not reach the merits of their article III, § 16 claim. Further, petitioners' remaining arguments are either unpreserved or without merit.

Accordingly, on the appeal from the July 17, 1997 order of the Appellate Division, the order should be affirmed, with costs; insofar as it is taken from the March 4, 1997 Appellate Division order, the appeal should be dismissed upon the ground that the order does not finally determine the action within the meaning of the Constitution.

* * * * * * * * * * * * * * * * * *

On the appeal from the July 17, 1997 order of the Appellate Division, order affirmed, with costs; appeal, insofar as taken from that portion of the March 4, 1997 Appellate Division order that denied appellants' motion to enlarge the issues on appeal, dismissed upon the ground that that part of that Appellate Division order does not finally determine the action within the meaning of the Constitution. Opinion by Chief Judge Kaye. Judges Titone, Bellacosa, Smith, Ciparick and Wesley concur. Judge Levine took no part.

Decided June 9, 1998

Notes

1 Petitioners' notice of appeal referred both to the Appellate Division order affirming the Supreme Court's judgment and to a March 4, 1997 Appellate Division order denying a motion to enlarge the issues on appeal to include arguments pertaining to respondents Pataki, Finnegan and Sheffer that had previously been abandoned. The latter order is nonfinal and, accordingly, so much of petitioners' appeal as pertains to the March 4, 1997 order should be dismissed.

2 In relevant part, article VII, §11 provides that "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein."

3 The bond act in Hopkins authorized the creation of State debt to pay for canal construction, general fund deficiencies and the State's "floating indebtedness" objects that have neither a natural connection with each other nor a common unifying purpose. It is thus unlikely that the act would have survived scrutiny under the more flexible "single work or purpose" standard.

Appendix D

In the Matter of Robert L. Schulz et al., Appellants, v. New York State Executive et al., Respondents.

78929

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

233 A.D.2d 43; 660 N.Y.S.2d 881; 1997 N.Y. App. Div.

July 17, 1997, Decided
July 17, 1997, Entered

PRIOR HISTORY: [**1]

Appeal from so much of a judgment of the Supreme Court (Joseph Harris, J.), entered November 8, 1996 in Albany County, which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, held that the Laws of 1996 (ch 412) was constitutional.

DISPOSITION: The judgment is affirmed, without costs.

HEADNOTES:

Parties - Standing - Taxpayer's Action Challenging Constitutionality of Environmental Bond Act Petitioners lack standing as citizen-taxpayers under State Finance Law @ 123-b (1) to challenge the constitutionality of the "Clean Water/Clean Air Bond Act of 1996" (L 1996, ch 412), which authorized the State to incur indebtedness not exceeding $ 1.75 billion for the purpose of preserving the environment by means of safe drinking water projects, clean water projects, solid waste projects, environmental restoration projects and air quality projects (see, L 1996, ch 413). Since State Finance Law @ 123-b (1) specifically excepts from its application "the authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by

the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit [**2] corporation", a taxpayer has neither common-law nor statutory standing to challenge the issuance of State bonds or bond anticipation notes. Petitioners' challenge to the constitutionality of State Finance Law @ 123-b (1), raised for the first time in their reply brief, has not been properly raised on appeal and lacks merit in any event. In addition, petitioners lack constitutional voter standing with regard to so much of the proceeding as is predicated on NY Constitution, article III, @ 16, as that provision is not "linked to any voting rights".

Parties - Standing - Voter Standing to Challenge Environmental Bond Act as Violative of "Single Work or Purpose" Constitutional Debt-Incurring Provision Petitioners have separate and independent voter standing to challenge the "Clean Water/Clean Air Bond Act of 1996" (L 1996, ch 412), which authorized the State to incur indebtedness not exceeding $ 1.75 billion for the purpose of preserving the environment by means of safe drinking water projects, clean water projects, solid waste projects, environmental restoration projects and air quality projects (see, L 1996, ch 413), as violative of NY Constitution, article VII, @ 11, which [**3] provides, inter alia, that "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein". An important purpose underlying this constitutional provision was to permit the people of the State to intelligently evaluate and appraise the single purpose of any proposed long-term bonded indebtedness to be incurred by the State and to prohibit the Legislature from lumping several purposes into one bond authorization and thereby obtain voter approval that perhaps could not otherwise be obtained if the relative merit and strength of each purpose were separately evaluated and appraised. Voter standing to sue in an action or proceeding predicated, as here, upon an alleged violation of any of the fundamental requirements of NY Constitution, article VII, @ 11 is therefore necessary to ensure that the State government does not ignore constitutional dictates concerning public financing laws, especially since a citizen-taxpayer lacks standing under

State Finance Law @ 123-b (1) to challenge the issuance of State bonds or bond anticipation notes.

Constitutional Law - Validity [**4] of Statute - Challenge to Environmental Bond Act as Violative of "Single Work or Purpose" Constitutional Debt-Incurring Provision The "Clean Water/Clean Air Bond Act of 1996" (L 1996, ch 412), which authorized the State to incur indebtedness not exceeding $ 1.75 billion for the purpose of "preserving, enhancing, restoring, and improving" the quality of the State's "environment" by means of safe drinking water projects, clean water projects, solid waste projects, environmental restoration projects and air quality projects (see, L 1996, ch 413), is not violative of NY Constitution, article VII, @ 11, which provides, inter alia, that "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein". The broad environmental projects authorized by the bond act are necessarily and naturally related to one another such that they constitute a single purpose within the meaning of the constitutional provision. As such, the voters were permitted to "intelligently evaluate and appraise" the wisdom of incurring the subject indebtedness for the single over-all purpose of [**5] benefitting the State's environment and, thus, the purpose underlying the "single work or purpose" provision of NY Constitution, article VII, @ 11 was fulfilled.

COUNSEL:

Robert L. Schulz, Queensbury, and John Salvador, Jr., Lake George, appellants pro se.

Dennis C. Vacco, Attorney-General, Albany (Denise A. Hartman of counsel), for New York State Executive, respondent.

Cravath, Swaine & Moore, New York City (Michael R. Siebecker of counsel), for Michael C. Finnegan and another, respondents.

Patricia L. Murray and Peter S. Kosinski, Albany, for New York State Board of Elections, respondent.

JUDGES: Cardona, P. J., White, Casey and Carpinello, JJ., concur.

OPINIONBY: Mercure
OPINION: [*45]
Mercure, J.

In July 1996, the Legislature passed Laws of 1996 (ch 412), which authorized the State to incur indebtedness not exceeding $ 1.75 billion for the purpose of preserving the environment. That law, known as the "Clean Water/Clean Air Bond Act of 1996" (L 1996, ch 412, @ 1; hereinafter the Bond Act), was signed by respondent Governor and approved by the voters at the November 1996 general election. The stated "single purpose" [**6] of the Bond Act was: "preserving, enhancing, restoring, and improving the quality of the state's environment by the accomplishment of projects and the funding of activities by state agencies, public authorities and public benefit corporations, municipalities, and other governmental entities and not-for-profit corporations for and related to protecting, improving, and enhancing the quality of drinking water and enhancement of water bodies; by providing funds for open space, and for parks, historic preservation, and heritage area improvements; by providing funds for solid waste projects; by providing funds for the restoration of contaminated properties, and by providing funds for air quality projects" (Bond Act @ 2). Simultaneously, Laws of 1996 (ch 413) was enacted for the purpose of implementing the Bond Act within the separate categories of safe drinking water projects, clean water projects, solid waste projects, environmental restoration projects and air quality projects.

Petitioners commenced this combined proceeding and action seeking, inter alia, a declaration that the Bond Act was unconstitutional as violative of NY Constitution, article VII, @ 11 n1 and article III, [**7] @ 16. n2 In lieu of serving an answer, respondents moved to dismiss the petition/complaint;

petitioners responded with a motion for summary judgment. Supreme Court denied petitioners' summary judgment motion as premature and, addressing respondents' motion, determined that petitioners [*46] lacked standing and that the Bond Act violated neither of the identified constitutional provisions. Petitioners appealed to the Court of Appeals from so much of Supreme Court's order as declared that the Bond Act was not violative of NY Constitution, article VII, @ 11 or article III, @ 16. The Court of Appeals sua sponte transferred the appeal to this Court, and we denied petitioners' subsequent motion to enlarge the issues on appeal.

----------Footnotes----------

n1 As relevant to this proceeding, NY Constitution, article VII, @ 11 provides that: "no debt shall be hereafter contracted by or in behalf of the state, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein".

n2 NY Constitution, article III, @ 16 provides: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act."

----------End Footnotes----------

[**8]

Addressing first the issue of standing, we agree with respondents that petitioners lack citizen-taxpayer standing to mount either of the challenges at issue here. As shall be discussed in some detail, because State Finance Law @ 123-b (1) specifically excepts from its application "the authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof by the state or any agency, instrumentality or subdivision thereof or by any public corporation or public benefit corporation", a taxpayer has neither common-law nor statutory standing to challenge the issuance of State bonds or bond anticipation notes (see, Wein v Comptroller of State of N. Y., 46

NY2d 394, 399-400; Schulz v State of New York [hereinafter Schulz I], 193 AD2d 171, 177, affd 84 NY2d 231, cert denied 513 US 1127; Schulz v State of New York [hereinafter Schulz II], 185 AD2d 596, 597, appeal dismissed 81 NY2d 336). Petitioners' challenge to the constitutionality of State Finance Law @ 123-b (1), raised for the first time in their reply brief, is not properly before us (see, Fishman v Beach, 237 AD2d 705, 706; O'Sullivan v O'Sullivan, 206 AD2d [**9] 960) and lacks merit in any event (see, Schulz II, supra, at 597). We also agree with respondents that petitioners lack constitutional voter standing with regard to so much of the proceeding as is predicated on NY Constitution, article III, @ 16, as that provision is not "linked to any voting rights" (Schulz I, supra, at 177; see, Matter of Schulz v State of New York, 81 NY2d 336, 344-347, supra).

We take a different view, however, on the question of petitioners' voter standing to prosecute the claim of violation of NY Constitution, article VII, @ 11. In Matter of Schulz v State of New York (supra,) the Court of Appeals traced the evolution of standing principles as related to "public financing challenges", ultimately addressing the question of whether the Executive and Legislative Branches should "be allowed to erect 'an impenetrable barrier to any
judicial scrutiny of legislative action[s]' " (id., at 345, quoting Boryszewski v Brydges, 37 NY2d 361, 364) and giving a negative response. As noted by that Court, its 1975 decision in Boryszewski v Brydges (supra) [*47] marked a significant departure from the established position that [**10] " 'the constitutionality of a State statute may be tested only by one personally aggrieved thereby' " (Matter of Schulz v State of New York, supra, at 344, quoting St. Clair v Yonkers Raceway, 13 NY2d 72, 76, cert denied 375 US 970), heralding a new era of governmental accountability to taxpayers challenging "enactments of our State Legislature as contrary to the mandates of our State Constitution" (Boryszewski v Brydges, supra, at 362). However, the Legislature's nearly simultaneous enactment of State Finance Law article 7-A, and particularly State Finance Law @ 123-b (1), with its grant of statutory standing to citizen taxpayers but concomitant denial of standing in cases involving "the

authorization, sale, execution or delivery of a bond issue or notes issued in anticipation thereof", greatly forestalled that effort. Ultimately, in Wein v Comptroller of State of N. Y. (supra), the Court of Appeals was constrained to the conclusion that the effect of the "exception" contained in State Finance Law @ 123-b (1) was to deny both statutory and common-law standing to those challenging the issuance of State bonds or bond anticipation notes (id., at 399-400; [**11] see, New York State Coalition for Criminal Justice v Coughlin, 64 NY2d 660).

However, in Matter of Schulz v State of New York (supra) the Court of Appeals again signaled its "disposition to expand rather than to contract the doctrine [of standing]" (Boryszewski v Brydges, supra, at 363) by recognizing an individual's right to enforce voting rights under NY Constitution, article VII, @ 11 (Matter of Schulz v State of New York, supra, at 346-347). Citing to the public's skepticism for public indebtedness and particularly "borrowing by long-term debt to pay ordinary operating expenses of the government" (id., at 346), the Court recognized that it is the electorate itself, exercising the "constitutional prerequisite of a public referendum", that represents the "ultimate, prudent check-and-balance" (id., at 346). Under the circumstances, "[s]erious concerns accompany a complete cloak of immunity that would preclude access to judicial review of challenged public financing schemes" (id., at 346). Therefore, the Court of Appeals announced the existence of "separate and independent ... voter standing to sue on financing schemes subject to voter referendum [**12] approval" (id., at 347 [citations omitted]) and directed that, to the extent they have been read as a total ban on standing in such cases, Wein v Comptroller of State of N. Y. (supra), New York State Coalition for Criminal Justice v Coughlin (supra) and State Finance [*48] Law @ 123-b should not be followed (see, Matter of Schulz v State of New York, supra, at 347).

Contesting none of the foregoing, respondents nonetheless contend that the Court of Appeals decision in Matter of Schulz v State of New York (supra) should be limited to its particular factual setting, i.e., "the narrow circumstance where plaintiffs

seek to enforce the voter referendum requirement of [NY Constitution, article VII, @ 11]". We are very much bothered by this position, predicated as it is on the assumption that the Executive and Legislative Branches of our State government may safely ignore the constitutional dictates concerning public financing laws so long as they are successful in exhorting the electorate to rubber-stamp their actions. It is worthy of some note that this Court 20 years ago recognized that an important purpose underlying NY Constitution, article [**13] VII, @ 11 was "to permit the people of the State to intelligently evaluate and appraise the single purpose of any proposed long-term bonded indebtedness to be incurred by the State and to prohibit the Legislature from lumping several purposes into one bond authorization and thereby obtain voter approval that perhaps could not otherwise be obtained if the relative merit and strength of each purpose were separately evaluated and appraised" (New York Pub. Interest Research Group v Carey, 59 AD2d 172, 176, revd on other grounds 42 NY2d 527). In any event, we perceive no such limitation
in Matter of Schulz v State of New York (supra). To the contrary, we believe that the Court of Appeals expression of concern over the preexisting "cloak of immunity" (id., at 346) and recognition of the need for "voter standing to sue on financing schemes subject to voter referendum approval" (id., at 347) evidences an intent to permit voter standing in an action or proceeding predicated upon an alleged violation of any of the fundamental requirements of NY Constitution, article VII, @ 11. In our view, a contrary determination would reduce the existing grant of standing to a [**14] meaningless charade.

We shall now address the merits of petitioners' claim that the enactment of the Bond Act violated NY Constitution, article VII, @ 11. It is petitioners' position that, contrary to the express provision of NY Constitution, article VII, @ 11, the Bond Act authorizes a "multiplicity" of works or purposes, none of which are "distinctly specified" therein. In essence, it is petitioners' argument that the stated "single purpose" of "preserving, enhancing, restoring, and improving the quality of the state's environment" is really nothing but a catch-all [*49] phrase,

encompassing a great many purposes and objects, including drinking water, water bodies, open space, parks, historic preservation, heritage areas, solid waste, contaminated properties, air quality, natural resources, debt financing, budget balancing, farmland preservation, agricultural protection, urban cultural parks, economic development, recreation, technology development and transfer, public access to water bodies, operating and maintenance costs and transportation. Although reasonable people may disagree on the applicability of some of the categories identified by petitioners, there can [**15] be no serious question that the "single work or purpose" stated in the Bond Act is a broad one.

The relevant inquiry, then, focuses on the actual breadth the constitutional provision will permit. As originally adopted in 1846 for the purpose of preventing the Legislature from excessive borrowing, the precursor to NY Constitution, article VII, @ 11 required that any proposed long-term indebtedness be approved by the voters and must be for a "single work or object" (1846 NY Const, art VII, @ 12; 1938 Report of NY Constitutional Convention Comm, vol 10, at 81-93; see, New York Pub. Interest Research Group v Carey, 59 AD2d 172, 175, supra). Feeling that the language "single work or object" was too restrictive because it would permit a bond issue for only one physical structure (1915 Revised Record of NY Constitutional Convention, vol 2, at 1295-1299), the provision was amended in 1938 to substitute the word "purpose" for the word "object" (see, New York Pub. Interest Research Group v Carey, supra, at 175). In1977, this Court devised a test for determining whether the liberalized standard had been satisfied: "In order for a bond authorization act to constitute a single [**16] purpose the various components that enter into it must be so necessarily and naturally related that when combined they constitute an entity; something complete in and of itself but separate and apart from other objects" (id., at 176). Applying the test so formulated, it determined that "'comprehensive economic development' " does not constitute a single purpose (id., at 176). By way of example, however, the Court did indicate that "transportation" or "environment" would constitute a single purpose (id., at 176).

Although by no means bound by that dictum, we are of a like mind. Unlike the four sharply dissimilar subcategories considered in New York Pub. Interest Research Group v Carey (supra [industrial and community development, tourism and recreation, conservation and environment, and local transportation access]), here the major divisions of the Bond Act, i.e., [*50] safe drinking water, improvement and enhancement of water quality, improvement of solid waste facilities, restoration of contaminated properties and improvement and enhancement of air quality, are necessarily and naturally related to one another such that they constitute an entity complete [**17] in and of itself (see,id., at 176). As such, we conclude that the voters were permitted to "intelligently evaluate and appraise" the wisdom of incurring the subject indebtedness for the single over-all purpose of benefitting the State's environment (id.) and, thus, the purpose underlying the "single work or purpose" provision of NY Constitution, article VII, @ 11 was fulfilled.

For the foregoing reasons, we conclude that Supreme Court did not err in its declaration of constitutionality.

Cardona, P. J., White, Casey and Carpinello, JJ., concur.

Ordered that the judgment is affirmed, without costs.